IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, v. ENRON CORP., et al., Defendants.	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

MEMORANDUM IN SUPPORT OF TITTLE PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED PARTIAL SETTLEMENT AND CONDITIONALLY CERTIFYING CLASS FOR PURPOSES OF SETTLEMENT

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I. INTRODUCTION

Plaintiffs in the *Tittle* ERISA action, *Tittle, et. al. v. Enron Corp., et. al.,* No. H-01-CV-3913 (S.D. Tex.) respectfully submit this Memorandum Of Law In Support Of Their Motion For Preliminary Approval Of Proposed Partial Settlement; Approval Of Class Notice; Conditional Certification Of The Class For Settlement Purposes, and Setting Of Final Approval Hearing. The Named Plaintiffs and the Settling Defendants are referred to collectively as the "Settling Parties" in accordance with the terms of the Class Action Settlement Agreement, attached hereto as Exhibit A. The Order Preliminarily Approving Settlement is attached as Exhibit B, the Form of Notices as Exhibits C and D, and the Final Order of Judgment and Dismissal as Exhibit E. A Scheduling Order for the proposed partial settlement is attached as Exhibit F.

This Court previously approved a Settlement Class in the *Tittle* action, in the settlement with Arthur Andersen Worldwide Societe Cooperative ("AWSC") and its former member firms. The Court certified that AWSC Settlement Class pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure, holding that: (1) the prosecution of separate actions by individual *Tittle* Settlement Class members would create a risk of inconsistent or varying adjudications; and (2) adjudications with respect to individual *Tittle* Settlement Class members would as a practical matter be dispositive of the interests of other individual *Tittle* Settlement Class members not parties to the *Tittle* action, or substantially impair or impede the ability of such other individual *Tittle* Settlement Class members to protect their interests. Importantly, no *Tittle* Settlement Class member objected or filed an appeal of the Court's order of final judgment and dismissal in regards to that settlement. The current settlement represents the second partial settlement of this complex ERISA class action and should similarly be preliminarily approved by the Court.

This partial settlement is for $85,000,000.[1] In addition to those funds, the Settling Defendants have also agreed to a cooperation clause which includes providing documentation

[1] In addition, Plaintiffs will receive a note for payment of an additional $100,000 from one of the individual Settling Defendants.

and other information relevant to the claims of the plaintiffs and any transcripts of depositions that were taken of them by any federal agency pertaining to compliance with ERISA, or breach of fiduciary duty under ERISA. The Settling Parties have further agreed that the Settlement Agreement will not bar in any manner the Named Plaintiffs' ability to obtain discovery from the Settling Defendants in the *Tittle* action. The settlement **does not** release Enron Corp., Northern Trust Company, Arthur Anderson L.L.P., Kenneth Lay, or Jeffrey Skilling. The litigation against these non-settling defendants will continue.

Because the settlement does not resolve the claims against all of the insureds under the applicable insurance policies, it also provides for the resolution of coverage issues relating to the settling defendants, including the possibility of an interpleader or similar action and the determination of the fairness of the judgment credit for any non-settling Defendant pursuant to an order barring contribution claims against the Settling Defendants.

The Plaintiffs request that this preliminary approval motion be granted because the proposed settlement is fair, reasonable and adequate. It is an excellent result for the Settlement Class. All litigation has risks, both legal and factual. The ERISA breach of fiduciary duty claims are, in Plaintiffs' view, very solid. It cannot be denied, however, that this is a rapidly developing, and somewhat esoteric, area of the law. Even though Enron's misconduct is widely known, presenting the case at trial will be a mammoth undertaking. Settlement with these Defendants wisely avoids many of these risks with regards to claims against them. Moreover, just as with the preliminary and final approval of the AWSC settlement, the Named Plaintiffs in *Tittle* who will be conditionally certified as the *Tittle* class representatives wholeheartedly support this partial settlement. The parties have established all necessary prerequisites for preliminary approval of the settlement and, following the issuance of notice and a fairness hearing, for final approval of the settlement.

II. FACTUAL BACKGROUND OF THIS LITIGATION

The Court has addressed many of the claims and defenses of the Settling Parties in its decision *In re Enron Corp. Securities, Derivative and ERISA Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003). This partial settlement will resolve the *Tittle* action with respect to the Administrative Committee Settling Defendants and the Office and Director Settling Defendants as they are defined in the Settlement Agreement, Ex. A.[2] The claims asserted against these defendants are grounded in their alleged roles as Plan fiduciaries, specifically that they breached duties to:

1. provide participants in the Plans with accurate information regarding Enron stock and induced participants to direct their retirement savings into Enron stock;
2. monitor Enron stock and ensure it was a prudent investment for the Plans, as well as to monitor other fiduciaries and to disclose to them material facts concerning Enron's financial condition;
3. postpone the transition of the Savings and ESOP Plans (the "Lockdown") when it was clear from Enron's precarious financial condition that it would have been prudent to do so, and to provide timely and informative notice of the Lockdown to participants so that they could safeguard their retirement assets; and
4. diversify the investments of the Plans so as to minimize the risk of large losses under both the Savings Plan and ESOP.

This partial settlement would resolve the above claims in the *Tittle* action with respect to the Administrative Committee Settling Defendants, and the Officer and Director Settling Defendants.

Each of the Settling Defendants has vigorously defended against these claims, and without this settlement, would continue to do so. Each brought extensive motions to dismiss on various grounds, including the absence, extent, and/or satisfaction of their fiduciary duties. The

[2] Those individuals are more specifically identified in Schedules 1.3 and 1.29 to Exhibit A.

claims and defenses have been detailed in this Court's Order and the monumental briefing on the motions to dismiss. That opinion of over 140 pages details the myriad factual and legal issues that confront the parties to this lawsuit. *See Enron*, 284 F. Supp. 2d 511 .

The substantial and very real value this settlement represents to the participants is undeniable. In short, the settlement merits Court approval.

III. THE SETTLEMENT

The terms of the settlement are embodied in the Class Action Settlement Agreement ("SA") Exhibit A. The Agreement confers significant benefits to the Settlement Class. For present purposes, its most important features are discussed below.

Within 10 days after preliminary approval by the Court, the Settling Parties shall establish a Settlement Trust, and shall jointly select a trustee that would be subject to the Court's approval. SA ¶ 8.1.1. The Settlement Trust will hold and bear interest of the settlement amount, which will consist of $85,000,000 from the underwriters[3] and an additional note for $100,000 from defendant Cindy Olson. SA ¶¶ 8.1.3; 8.2.3. The Settlement Trust shall hold the funds until the settlement becomes final and the Court orders the net distribution to the Plans pursuant to the Plan of Allocation. SA ¶¶ 8.1.1-8.1.3. Importantly, the Settling Parties agree to structure the Settlement Trust to the extent possible to preserve for the Settlement Class the tax benefits associated with retirement plans. SA ¶ 8.6.2. In addition, the Settlement does not release or otherwise affect the Class Members' claims directly or derivatively under state or federal securities laws. SA ¶ 4.6.2. Thus, it is a settlement of the *Tittle* Class ERISA claims ***only***.

If the underwriters commence an interpleader or similar action rather than depositing policy proceeds directly into the Settlement Trust, then under the terms of the Class Action Settlement Agreement all interest earned on the interpleaded funds (or if the underwriters post a bond, then all interest allowed by the Court) shall be added to and become part of the settlement

[3] This amount represents 100% of the two Enron fiduciary liability policies (exclusive of defense costs otherwise payable under the separate sub-limit of the AEGIS policy).

amount to be deposited into the Settlement Trust. This provision was included in order to ensure that any delay caused by an interpleader does not serve the interests of the carriers or harm those of the Class.

In addition, the Agreement provides for continued cooperation by the Settling Defendants. Upon request by the Named Plaintiffs, the Administrative Committee Settling Defendants shall make available for copying and inspection any documents or other information in their possession that may be relevant to the claims of the Named Plaintiffs against any of the non-settling defendants, to the extent such information is not protected by the attorney-client or work-product privileges. SA ¶ 5.2.1. The Settling Defendants shall also provide a copy of all transcripts in their possession for any depositions taken by any federal agency pertaining to breaches of fiduciary duty or compliance with ERISA. *Id.* The Named Plaintiffs may continue to obtain discovery from any Settling Defendants in the *Tittle* action and to the extent allowed by the Federal Rules of Civil Procedure. *Id.*

The proposed Settlement Agreement is conditioned upon the Court's entry of a bar order that is fair to the Settling Parties, the Settlement Class and the non-settling defendants, and that: (1) bars all claims against the Defendant Releasees for indemnity, contribution and for any other claims arising out of or concerning any of the Claims released under the Settlement Agreement against the Defendant Releasees, and (2) provides that any judgments on claims under ERISA entered against those persons covered by the bar order will be reduced by an amount equal to the Class Settlement Amount, such that the total amount of Plaintiffs' potential recovery against all such Barred Persons shall be reduced by the Class Settlement Amount, except that non-settling defendants under the bar order who are insureds under the Enron Fiduciary Liability Policies will receive an additional judgment reduction in the amount of $10,000,000. SA ¶ 2.5.

Finally, the Settlement Agreement is also conditioned upon the resolution of any interpleader or similar action such that its finality requires either approval of the use of the policy limits as contemplated in the agreement or a supervening agreement by the parties to adjust the

Class Settlement Amount in a manner consistent with the findings of the Court. SA ¶¶ 2.11; 8.6. To facilitate a prompt resolution of any interpleader action, the Settling Parties agreed to jointly seek the removal of such action to federal district court, and consolidation with the Tittle action before your Honor.

IV. ARGUMENT

A. The Proposed Settlement Satisfies the Requirement of Fed. R. Civ. P. 23(e).

This settlement represents a compromise in a contested matter involving a rapidly developing area of the law. Public policy strongly favors the pretrial settlement of complex class action lawsuits. *See, e.g., Maher v. Zapata Corp.,* 714 F.2d 436, 455 (5th Cir. 1983); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3rd Cir. 1995).

Under Rule 23(e), before a class action may be dismissed or compromised, a judicially approved form of notice of the proposed dismissal or compromise must be given in a manner directed by the court. Thus, as a threshold requirement, Rule 23(e) requires adequate notice to the Class. *Pettway v. American Cast Iron Pipe Co.,* 576 F. 2d 1157, 1219 (5th Cir. 1978). In the context of an ERISA class, however, the function of notice is different than for a class of securities holders. As several courts have noted, "[b]ecause individuals may bring class actions to remedy breaches of fiduciary duty only on behalf of the plan, rather than themselves, the Court cannot allow absent participants or beneficiaries to opt out of this class." *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991).

Nevertheless, courts typically require notice to absent class members to provide them with the opportunity to object. *See Mertens v. Kaiser Steel Ret. Plan*, 744 F. Supp. 917, 921 (N.D. Cal. 1990) (stating "[a]lthough no opt-out opportunity can be granted, since the right to recovery belongs to the benefit plan, notice of the action would at least afford absent parties the opportunity to consider intervention in order to safeguard their derivative interests").

Accordingly, the form of notice must be sufficient to accomplish this general purpose. *See, example, Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 963 (3rd Cir. 1983) (explaining that in a non opt-out class, the form and purpose of the notice "need only be such as to bring the proposed settlement to the attention of representative class members who may alert the Court to inadequacies in representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement."); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (noting that in a non opt-out action, "there is no requirement for individualized notice beyond that required by due process").

This is the function of notice that the Court ordered for the *Tittle* Settlement Class in the AWSC settlement where its members received notice of the settlement, but could not request to be excluded with respect to the *Tittle* ERISA claims. *See* Order Preliminarily Approving Settlement, Exhibit A-1, Section XI. There, as is proper here, the *Tittle* Settlement Class was certified as a Rule 23(b)(1)(B) class, which particularly applies to situations such as "an action which charges a breach of trust by [a] . . . fiduciary . . . affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." *See* Fed. R. Civ. P. 23(b)(1)(B) advisory committee note (1966 Amendment).

Just as in the AWSC partial settlement, the proposed notices for this settlement are adequate and are the best notices practicable under the circumstances. The proposed notice that is attached as Exhibit C will be sent by first-class mail to the last known address of the class members within 20 days of preliminary approval of the settlement (or on such other date as set by the Court). These are the same addresses used by the plan administrator to mail the plan notices, quarterly statements, and other plan-related information. In addition, as provided in the Settlement Agreement, an abbreviated form of the notice that is attached as Exhibit D will be published in the *Houston Chronicle*, in *The Wall Street Journal*, in *The Oregonian*, in the *Omaha World-Herald*, and on Class Counsels' websites.

B. Consideration of Final Approval Criteria Supports Preliminary Approval.

The general standard for final approval of a proposed settlement of a class action in the Fifth Circuit is whether it is "fair, adequate and reasonable" and has been entered into without collusion between the parties. *Cotton*, 559 F.2d at 1330; *see also Ruiz v. McKaskle*, 724 F.2d 1149, 1152 (5th Cir. 1984) (*per curiam*). In applying this standard, the court must determine whether, in light of the claims and defenses asserted by the parties, the proposed compromise represents a "reasonable evaluation of the risks of litigation." *Fla. Trailer & Equip. Co. v. Diehl*, 284 F.2d 567, 571 (5th Cir. 1960).

It is settled that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). Thus, the Fifth Circuit has consistently held that settlements "will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (citing *Pearson v. Ecological Sci. Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)).

In weighing the benefits obtained by settlement against benefits dependent upon the likelihood of recovery on the merits, the courts are not expected to balance the scales perfectly. The "trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and abandoning of highest hopes." *Cotton*, 559 F.2d at 1330 (citations omitted). The very object of compromise "is to avoid the determination of sharply contested and dubious issues." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971) (citations omitted).

When examined under these applicable criteria, this partial settlement is an excellent result for the settlement class. First, the costs of litigation to date are apparent. The briefing on the motions to dismiss, including several *amici curiae* briefing by interested parties and responses thereto, was enormous. Document discovery to date in the *Tittle* ERISA matter is in excess of two million pages, excluding voluminous electronic databases and additional

productions that are in process. As additional production of 60 million pages for the overall Enron action also must be examined. Second, Enron is in bankruptcy and any recovery by plan participants from Enron thus, is likely to be discounted. Through arms-length negotiations and hard-fought compromise on all sides, the settlement achieves a substantial monetary benefit to the class in a prompt manner and without wasting of the corpus of the fiduciary liability policies. Defense costs incurred in continued litigation would quickly erode available policy limits once the separate sub-limit of the AEGIS policy is exhausted. Moreover, as the Court has pointed out and as the large number of supplemental briefs on the motions to dismiss attest, the issues in this developing area of the law will continue to play out, would likely result in significant additional motion and trial practice, including Summary Judgment proceedings, lengthy trial, and possible appeals. Thus, taking the circumstances into account, the settlement clearly is fair, adequate, and reasonable.

C. The Fifth Circuit's Six-Pronged Test of Fairness.

Pursuant to the Court's analysis in the previous partial settlement with AWSC, the test for judicial approval of settlements is met in this instance. *See Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *see also Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986). The six prongs of that test are:

1. The assurance that there is no fraud or collusion behind the settlement;

2. The stage of the proceedings and the amount of discovery completed;

3. The probability of plaintiff's success on the merits;

4. The range of possible recovery;

5. The complexity, expense and likely duration of the litigation; and

6. The opinions of class counsel, class representatives, and absent class members.

Id. Each criteria is met in this settlement.

1. There is No Fraud or Collusion Behind the Settlement.

Negotiations concerning payment of the full limit of the fiduciary liability policies began during the briefing on the motions to dismiss over two years ago. Those settlement negotiations have spanned the time since then and included numerous meetings and conferences. The parties exchanged extensive information regarding their respective positions, including documentation on the insurance available to satisfy any judgment and the financial status of the individuals included in the settlement. The parties negotiated multiple settlement agreement drafts, each followed by additional negotiations regarding the specific terms of the settlement agreement. Virtually every term was negotiated strenuously by counsel on behalf of their respective clients.

Counsel negotiating the settlement have national reputations for vigorous prosecution and defense. The Settling Defendants are represented by Steptoe & Johnson, L.L.P.; Nickens, Keeton, Lawless, Farrell & Flack, L.L.P.; and Gibbs & Bruns, L.L.P. Each firm is well respected nationally for its vigorous and tenacious defense of complex civil matters. The plaintiffs are represented by the Co-Lead Counsel appointed by this Court to represent the participants in the Enron plans: Keller Rohrback L.L.P. and Hagens Berman, L.L.P. These firms were appointed by the Court for their extensive experience in ERISA matters and their vigorous prosecution of complex civil matters that have afforded them national reputations as well. The Settlement Agreement was negotiated by senior members of these firms who understand the strengths and weaknesses of the various claims and defenses available to the parties. At all times, the negotiations were conducted at arms-length. The result is a fair and reasonable settlement.

2. Stage of the Proceedings and Discovery Completed.

There has been more investigation, both formal and otherwise, into the collapse of Enron Corp., than probably any other corporate demise in history. Thousands of pages of congressional investigations and congressional testimony were reviewed by counsel. Enron, the Settling Defendants and others who worked intimately with them at Enron, and entities which provided services to the Plans have produced millions of pages of discovery.

The parties' investigation and discovery is evident in the filings on the motions to dismiss. No fewer than twenty motions to dismiss were filed, many of which had extensive attachments. In addition, more than three *amici curiae* briefs were filed and responded to by the *Tittle* plaintiffs. The resulting opinion of this Court is over 140 pages and is one of the most exhaustive judicial opinions on fiduciary duties under ERISA ever written.

Based on the extent of that intensive litigation, the parties to the Settlement Agreement reached this agreement with a "full understanding of the legal and factual issues surrounding this case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996).

3. Probability of Success on the Merits.

The *Tittle* plaintiffs have a strong liability case, indeed a far stronger case now than when the actions was filed. The law then was still developing and only one reported case, *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457 (E.D. Pa. 2000) ("*Ikon* (Class Cert.)"), had addressed principal ERISA issues involved in company stock 401(k) cases. Although the *Ikon* decisions were favorable, *id.* (granting class certification), *In re Ikon Office Solutions, Inc. Sec. Litig.*, 86 F. Supp. 2d 481 (E.D. Pa. 2000) (denying motion to dismiss), one could not deny that Plaintiffs here were asserting claims that had not yet been thoroughly tested.

In the years this case has been pending, all that has changed. The issue of company stock in 401(k) plans and concentration of company stock in ESOP's is now the subject of much judicial and regulatory attention. The most thorough treatment is this Court's opinion, *Enron*,

284 F. Supp. 2d 511 , which evaluated the extensive briefing on the motions to dismiss by the parties, as well as several *amicus* briefs, including that filed by the Department of Labor. Many other federal district courts have now issued opinions which support the Court's analysis of Plaintiffs ERISA claims and have denied in whole, or in part, motions to dismiss claims which are similar to these asserted here. These include, among others, *Rankin v. Rots*, --- F.R.D. ---, No. 02-71045, 2004 WL 831124 (E.D Mich. Apr. 16, 2004) ("*Kmart ERISA* (Class Cert.)") (granting class certification); *Rankin v. Rots*, 278 F. Supp. 2d 853 (E.D. Mich. 2003) ("*Kmart ERISA* (Motion to Dismiss)"); *In Re Elec. Data Sys. Corp. "ERISA" Litig.,* 305 F. Supp. 2d. 658 (E.D. Tex. 2004)("EDS")*; In Re CMS Energy ERISA Litig.,* ---F. Supp. 2d ---, No. 02-72834, 2004 WL 737335, at *8 (E.D. Mich. Mar. 31, 2004); *In Re Sears, Roebuck & Co. ERISA Litig. ("Sears")*, No. 02-8324, 2004 WL 407007 (N.D. Ill. Mar. 3, 2004); *In Re Xcel Energy, Inc. Sec., Derivative & "ERISA" Litig. ("Xcel")*, ---F. Supp. 2d ---, Nos. 02-2677, 03-2219, MDL No. 1511, 2004 WL 758990 (D. Minn. Mar. 10, 2004); *Hill v. BellSouth Corp.*, ---F. Supp. 2d.---, No. 02-2440, 2004 WL 737085 (N.D. Ga. Mar. 30, 2004); *In re Williams Companies ERISA Litig.*, 271 F. Supp. 2d 1328 (N.D. Okla. 2003); *Stein v. Smith*, 270 F. Supp. 2d 157 (D. Mass. 2003); *In re WorldCom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003) ("*WorldCom II*"); *Kling v. Fidelity Mgmt. Trust Co.*, 270 F. Supp. 2d 121 (D. Mass. 2003); *In re Louisiana Pacific ERISA Litig.*, No. 02-1023, 2003 WL 21087593 (D. Or. Apr. 24, 2003); *Nelson v. IPALCO Enterprises, Inc.*, No. 02-0477, 2003 WL 402253 (S.D. Ind. Feb. 13, 2003); *Vivien v. WorldCom Inc.*, No. 02-01329, 2002 WL 31640557 (N.D. Cal. July 26, 2002) ("*WorldCom I"*).

Even in light of these major victories, however, Plaintiffs recognize that a finding of liability against all defendants on all counts can never be assured. While Plaintiffs' ERISA claims are, in our view, very solid, this remains a rapidly developing area of the law that is only now starting to work its way through the courts of appeal. There remains a risk that a given judge in a given case will view a particular legal issue differently.

On the factual side, even though Enron's misconduct is now widely known, presenting it to the Court is a mammoth undertaking and there is always some risk of a misfire. The Defendants have denied any liability for the breaches alleged by the Plaintiffs and they are all represented by excellent counsel.

Furthermore, in addition to extensive fact discovery, significant expert testimony will be required to prepare this case for trial. As is already true in this action, discovery, both in terms of attorney time, and out-of-pocket expenses, will be enormous. Partial settlement with these key defendants is the opportunity to secure a significant, certain benefit to the class, before a lengthy additional discovery period and many more millions of dollars are spent, potentially from the corpus of the fiduciary liability policies. *See*, *example*, *In re Ikon Office Solutions, Inc., Sec. Litig.*, 209 F.R.D. 94 (E.D. Penn. 2002) (finding that the complexity and duration of litigation of similar breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages, weighed heavily in favor of settlement). Therefore, this factor supports preliminarily approving the settlement.

4. The Range of Possible Recovery.

To assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig.*, 55 F.3d 768, 806 (3rd Cir. 1995) (citing Manual for Complex Litigation (Second) § 30.44 (1985)). Here, while the amount of the proposed settlement is fixed ($85 million, plus interest) the amount plaintiffs might otherwise recover against the Settling Defendants is uncertain.

The settlement is well within the range of reason given two factors. First, the Settling Defendants face damage claims that clearly exceed the Settlement Amount. Second, the Plaintiffs are faced with the prospect that the entire amount of the fiduciary insurance policies which were obtained to help pay for breach of fiduciary duty claims would be consumed by

litigation costs. The class plaintiffs as victims of the wrongful conduct have a real interest in receiving the benefits of the fiduciary policies. The Settling Defendants have a right and power to accept a settlement offer that falls within the policy limits. In this case, such a settlement has been reached and they will ask the fiduciary insurance carriers to step forward and use those insurance funds to fund this settlement. Absent settlement, the Settling Defendants would be forced to continue litigating the claims thereby incurring defense costs which would eventually consume the policy proceeds which is designed to cover the breach of fiduciary duty claims. Thus, the entire amount of the fiduciary liability policies are being made available for settlement on the eve of circumstances that will rapidly diminish by defense costs for the twenty-four Settling Defendants. In addition, as detailed more fully below, the estimation of damages in the *Tittle* action factor in favor of the settlement amount.

The potential damages faced by the Settling Defendants are substantial. Plaintiffs assert that the participants' retirement funds should not have been invested in Enron stock and should instead have been moved to a prudent investment. In determining damages, the parties must consider what a suitable and prudent investment ***would have returned*** in lieu of the imprudent one. Drawing on the Restatement of Trusts, courts have described the goal for measuring losses as "restoring plan participants to the position in which they would have occupied but for the breach of trust." *Eaves v. Penn,* 587 F.2d 453, 462 (10th Cir. 1978); *see also Donovan v. Bierwirth,* 754 F.2d 1049, 1056 (2d Cir. 1985) ("One appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust") (citing Restatement (Second) of Trusts §205(c) (1959)). Here, but for the imprudent investment in Enron stock, the Plans would have ostensibly invested in some other fund whose performance could become relevant to a calculation of damages.

To determine damages, a Court may look at the return plaintiffs' would have obtained had the plan's investment in Enron stock been invested instead in the best performing fund alternative in the plan. *See, e.g., Donovan,* 754 F.2d at 1056 (holding that "[w]here several

alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them"). The Defendants will undoubtedly attempt to dispute this measure of damages or offer some alternative measure of damages.

In order to assist the Court with its evaluation of the adequacy of the settlement amount, the following information is provided with respect to theoretical damages for both the Savings Plan and ESOP. The analysis for the Savings Plan includes separate calculations of both "purchaser" and "holder" damages because both those who held stock in their accounts at the beginning of the Class Period and allocated moneys to the Enron Stock Fund (and received matching contributions from Enron in the form of Enron common stock) during the Class Period were damaged. The ESOP analysis includes only holder damages because there were no contributions to the participants' accounts during the Class Period. The Savings Plan analysis provides the Court with calculations based on the preferred benchmark used to measure damages: if the funds had instead been invested in the best performing alternative in the Plan. We also provide the Court with two other benchmarks: the average performance of alternative funds in the Plan, excluding the Enron Stock Fund; and the performance of the S&P 500. The ESOP analysis is calculated upon a return that would have been achieved had the assets of the Plan been invested in an interest bearing money market account as provided for at Section XVI.8 of the Plan. For the purpose of analysis all performance data is for the period between the beginning of the Class Period and the date this memorandum was prepared.

Accordingly, for the Savings Plan, plaintiffs' potential holder damages compared to the Best Plan Alternative (the preferred measure of damages) follows. We have also included a comparison to the Average Plan Alternative and the S&P 500 Index for comparison purposes:

(a) Savings Plan Holder Damages

Alternative Fund	Performance	Potential Recovery for Holder Claims[4]
Best Plan Alternative (Fidelity Growth Company Fund – FDGRX)	21.9%	$344.0 million
Average Plan Alternative (excluding ENE)	0.01%	$282.3 million
S&P 500 Index	15.5%	$325.8 million

Application of these benchmarks to the Savings Plan purchaser damages is more difficult than it is for the holder damages because, unlike holder damages which are based on a single sum at a single point in time—the value of Enron Stock held at the beginning of the Class Period, purchaser damages are necessarily based on a series of investments over time. We have not yet obtained full discovery on this issue. For present purposes, however, a rough estimate of the impact the benchmarks have on the value of the purchaser claim can be calculated by assuming a uniform rate of return of the benchmarks over the Class Period, and calculating an average thereof. The following table presents the results of this analysis:

(b) Savings Plan Purchaser Damages

Alternative Fund	Average Rate of Alternatives	Potential Recovery for Purchaser Claims[5]
Best Plan Alternative (Vanguard Conservative Growth - VSCGX)	-2.01%	$103.0 million
Average Plan Alternative (excluding ENE)	-11.14%	$93.5 million
S&P 500 Index	-6.92%	$98.0 million

As indicated in the above tables, the approximate range of total *holder* and *purchaser* damages, *not* taking into account the risk of not prevailing, is approximately $447 million.

[4] Holder Claim damages are based on the value of Enron stock invested in the Savings Plan at the beginning of the Class Period, which was approximately $282.2 million.

[5] Purchaser Claim damages are based on the value of Enron stock invested in the Savings Plan during the Class Period, which was approximately $105 million.

(c) ESOP Damages.

Damages for the participants in the ESOP are based upon the dollar amount in the ESOP as of the beginning of the Class Period, $568,214,054. As stated earlier, there were no contributions to the ESOP during the Class Period. Therefore, had the plan assets been invested in a 3% money market account (compounding monthly), the potential recovery for ESOP participants would be $762,426,299.

As indicated above, the approximate range of total *holder* and *purchaser* damages for the Savings Plan and the damages for the ESOP, *not* taking into account the risk of not prevailing, is between $1.1billion and $1.2 billion. Therefore, under scenarios assuming the highest conceivable recovery after a full trial on the merits, the proposed settlement amount is between 7.73% and 7.09% of the total potential damages suffered by the Savings Plan and ESOP. If, as the defendants likely will argue, only purchaser claims for the Savings Plan may be considered, the range of alleged damages is between $856 and $865 million, under which scenario the proposed settlement amount is between 9.94% and 9.83% of the damages allegedly suffered by the Plans.

In short, the proposed ***partial*** settlement amount is well within the range that courts traditionally have found to be fair and adequate under the law. *See, e.g., In re Mego Fin. Corp. Sec. Litig.,* 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement with all defendants that comprised one sixth of the plaintiffs' potential recovery); *In re Crazy Eddie Sec. Litig.,* 824 F. Supp. 320 (E.D.N.Y. 1993) (settlement with all but one of the defendants of between 6% and 10% of damages); *cf Officers for Justice v. Civil Serv. Comm'n of S.F.,* 688 F.2d 615, 628 (9th Cir. 1982) (recognizing that complete settlement for a fraction of total potential damages is acceptable, particularly where other relief is obtained by the class). As the court explained in *Officers for Justice,* 688 F.2d at 615, the "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Id.* at 624 (citations omitted). Given the fact that this case will continue against the previously named defendants such as Enron

Corp., Arthur Andersen L.L.P., The Northern Trust Company, Kenneth Lay and Jeffrey Skilling, the settlement amount is a reasonable compromise under this principle.

5. The Complexity, Expense and Likely Duration of Litigation.

Based on the extent of litigation to date in the *Tittle* action, these factors support the appropriateness of settlement. As addressed earlier in this memorandum, the extent of discovery and the complexity on the motions to dismiss alone have been extraordinary. And that portion of the litigation is merely the beginning of what will assuredly be a much more extensive effort given the Court's ruling declining to dismiss the *Tittle* plaintiffs' claims. In fact, since the Court issued its opinion on the motions to dismiss, millions of pages of document discovery have been placed in the Depository, several million of which pertain directly to the claims brought against these Settling Defendants. A Deposition Protocol Order has been entered by the Court and depositions are set to begin in June, 2004, in two central locations—New York, and Houston. This settlement will allow the Settling Parties to avoid engaging in that lengthy deposition process and the costs attendant for it. The process of completing discovery, both fact and expert, will continue through November 30, 2005 under the Court's scheduling order, dated March 12, 2004.

Furthermore, the proposed partial settlement for $85 million is the largest ever settlement of an ERISA company stock class action. In addition, the settlement provides for continued cooperation and participation in the litigation by all the Settling Defendants. Though the Plaintiffs' lawyers will of course do their best to make this case a simple and compelling story, there is simply no doubt that the complexity of this litigation is an obstacle to achieving that goal. These factors weigh in favor of settlement. *See, e.g., Ikon*, 209 F.R.D. 94.

6. The Opinion of Counsel.

As described earlier, experienced counsel, after substantial arms-length negotiations with senior defense counsel, have concluded that the settlement is fair, reasonable, and adequate. Here, counsel for the *Tittle* plaintiffs have acquired a thorough understanding of the claims and

the defenses involved and submit that the settlement is appropriate and should be approved. Plaintiffs' Co-Lead Counsel are knowledgeable and experienced in ERISA litigation and class-action litigation, generally. *See, example, In re Washington Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Az. 1989) (finding that "[c]ounsels' opinions warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions" (citing *Officers for Justice*, 688 F.2d at 625).

For all the foregoing reasons, the settlement deserves the Court's preliminary and ultimately, final approval.

V. CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE PENDING A HEARING FOR FINAL DETERMINATION

A. Conditional Certification for Settlement Purposes

Certification for settlement purposes is common in ERISA breach of fiduciary duty class actions. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 308 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1114 (certifying class for settlement purposes in ERISA class action); *Specialty Cabinets*, 140 F.R.D. at 479 (same). However, the fact that a settlement has been reached does not alter or diminish the requirements for obtaining certification. *See, e.g., In re Gen. Motors.*, 55 F.3d at 800 ("[A] class action – whether certified for settlement or litigation purposes – must meet the class requisites enunciated in Rule 23."). On the contrary, the "certification requirements 'designed to protect absentees by blocking unwarranted or overbroad class definitions' demand 'undiluted, even heightened, attention in the settlement context.'" *In re Mego Financial*, 213 F.3d at 461-62 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

B. The Requirements for Class Certification

A case should be certified for class action treatment when the proponents satisfy all four subsections of Fed. R. Civ. P. 23(a), and at least one subsection of Fed. R. Civ. P. 23(b). *Hanlon v. Chrysler Corp.*, 150 F.3d at 1019 (9th Cir. 1988). The district court has broad discretion in

determining whether an action is maintainable as a class action. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986). Using that discretion, courts liberally interpret Rule 23 to effectuate its policy of fostering the class-wide resolution of similar claims against a common defendant. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968); *Weinberger v. Thornton*, 114 F.R.D. 599, 602 (S.D. Cal. 1986).[6] This principle is embodied in Rule 23(c)(1), which explicitly provides that an order certifying a class may be conditional, and "may be altered or amended" at any time prior to judgment. Fed. R. Civ. P. 23(c)(1)(C).

In conducting this analysis, this Court has the benefit of numerous reported decisions, which represent a clear consensus since virtually every reported decision considering alleged violations of fiduciary duties under ERISA has concluded that class certification is appropriate under Rule 23. *See*, *e.g., Kmart ERISA* (Class Cert.), 2004 WL 831124, at *11 (finding conditional certification of the ERISA claims proper under Rule 23(b)(1)(A) and (B)); *Koch v. Dwyer*, No. 98-5519, 2001 WL 289972, at *5 (S.D.N.Y. Mar. 23, 2001). ("Plaintiff's action charges breach of fiduciary duty affecting the large class of participants in the Plans and Plaintiff seeks equitable relief on behalf of those participants and their beneficiaries. Accordingly, class certification is proper under Rule 23(b)(1)(B)"); *Bublitz v. E.I. duPont de Nemours & Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001) (granting class certification under subsection (b)(2) in ERISA action involving alleged breach of fiduciary duties); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397-98 (E.D. Pa. 2001) (granting class certification of ERISA breach of fiduciary claims under subsections (b)(1) and (b)(2)); *Ikon* (Class Cert.), 191 F.R.D. at 466 (granting class certification under subsection (b)(1); "given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief. . . . There is also risk of inconsistent dispositions that would prejudice the

[6] "Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). As the Supreme Court has noted, class actions provide important protections for both defendants (from multiple claims for inconsistent or duplicative relief), and for plaintiffs (particularly absent class members, whose claims otherwise might never be vindicated). *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403-04 (1980).

defendants") (citations omitted); *Clauser v. Newell Rubbermaid, Inc.*, No. 99-5753, 2000 WL 1053395, at *7 (E.D. Pa. Jul. 31, 2000) (granting class certification of ERISA breach of fiduciary duty claims under subsection (b)(1)); *White v. Sundstrand Corp.*, No. 98-50070, 1999 WL 787455, at *6 (N.D. Ill. Sept. 30, 1999) (granting class certification under subsection (b)(2)) ("a breach of fiduciary duty claim is properly pursued as a class action"); *Bunnion v. Consol. Rail Corp.*, No. 97-4877, 1998 WL 372644, at *6 (E.D. Pa. May 14, 1998) (granting class certification under subsections (b)(1) and (b)(2); "ERISA breach of fiduciary duty claims may be certified as a class action"); *Kane v. United Indep. Union Welfare Fund*, No. 97-1505, 1998 WL 78985, at *9 (E.D. Pa. Feb. 24, 1998) (granting certification of ERISA fiduciary duty claim under subsection (b)(1)); *Feret v. Corestates Fin. Corp.*, No. 97-6759, 1998 WL 512933, at *14 (E.D. Pa. Aug. 18, 1998) (granting class certification under subsection (b)(1) for claims involving alleged breach of fiduciary duty); *Montgomery v. Aetna Plywood, Inc.*, No. 95-3193, 1996 WL 189347, at *5-6 (N.D. Ill. Apr. 16, 1996) (granting class certification under subsection (b)(1) for claims involving alleged breach of fiduciary duty); *Atwood v. Burlington Indus. Equity, Inc.*, 164 F.R.D. 177, 179 (M.D.N.C. 1995) (granting class certification under subsection (b)(1); "An action against a fiduciary under ERISA for harm done to a retirement plan must be for the benefit of the plan as a whole, not for the gain of any one beneficiary"); *Schutte v. Maleski*, No. 93-0961, 1993 WL 218898, at *9-10 (E.D. Pa. June 18, 1993) (certifying under Rule 26(b)(1)(B) where plan-wide relief sought); *Gruby v. Brady*, 838 F. Supp. 820, 827 (S.D.N.Y. 1993) (granting class certification under subsection (b)(1)); "all Fund Members seek the make-whole relief claimed by the named plaintiffs for breach of the defendants' fiduciary duties"); *Specialty Cabinets*, 140 F.R.D. at 479 (granting class certification; "Because an individual ERISA action to remedy breaches of fiduciary duty would 'substantially impair or impede' the ability of absent beneficiaries and participants to protect their interests, courts should certify these actions pursuant to Rule 23(b)(1)(B)"); *Diduck v. Kaszycki & Sons Contractors, Inc.*, 737 F. Supp. 792,

799 (S.D.N.Y. 1990) (certifying class under subsection (b)(1) in suit alleging breach of fiduciary duty), *aff'd in part, rev'd in part on other grounds*, 974 F.2d 270 (2d Cir. 1992).

As these authorities teach, plan-wide claims against ERISA fiduciaries are particularly suitable and appropriate for class certification. As such, the proposed Class satisfies each requirement of Rule 23(a), (b)(1).

C. The Proposed Class Meets the Requirements of Rule 23(a)

Rule 23(a) provides four prerequisites for certification:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defense of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The first two of these requirements are intended to identify so-called "natural" class actions – those in which joinder of all interested parties is impracticable and those presenting at least one common issue of fact or law. 1 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 3.1 (4th ed. 1992 & Supp. 2003). The third and fourth requirements define the desired attributes of the class representative. *Id*. Plaintiffs address each in turn.

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is "impracticable." This is partly a function of sheer magnitude and also a reflection of judicial experience. Where a class is plainly numerous (hundreds or thousands of members), joinder is impracticable and Rule 23(a)(1) is satisfied. *Ikon* (Class Cert.), 191 F.R.D. at 462 (finding numerosity in ERISA fiduciary breach case; "the court should make common sense assumptions regarding numerosity" when there are "thousands of participants in the plan in any given year"); *Dwyer*, 2001 WL 289972 at *3 (class of approximately 3400 ERISA plan participants was sufficiently numerous); *Hallaba v. WorldCom Network Servs, Inc.*, 196 F.R.D. 630, 634 (N.D. Okla. 2000) ("The Court finds that the proposed class potentially contains thousands of parties,

rendering it sufficiently numerous to satisfy the first element of Rule 23(a)"); *and see Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982) (stating "[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied").

While there is no bright-line test for numerosity, here there can be no fair dispute that the Class is so numerous that joinder of all members is impracticable. According to public documents there are over 20,000 participants and beneficiaries in the proposed Settlement Class which clearly satisfies the numerosity requirement.

2. Commonality

Rule 23(a)(2) is satisfied where there are "questions of law or fact common to the class." This does not require that all questions of law or fact be common and the courts have generally held that the "[t]hreshold of 'commonality' is not high." *Jenkins*, 782 F.2d at 472. A common question is one that, when answered as to one class member, "will affect all or a significant number of the putative class members." *Forbush v. J.C. Penny Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993). "In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) (citing *Gruby*, 838 F. Supp. at 828). Commonality is met if there is a single issue the "resolution of which will advance the litigation." *Kmart ERISA* (Class Cert.), 2004 WL 831124, at *4 (citations omitted).

As many courts have noted, common questions abound in ERISA breach of fiduciary actions. *See*, *e.g.*, *Id., Dwyer*, 2001 WL 289972, at *3 (finding common questions of law were established where plaintiff, a member of 401(k) Plan and ESOP, alleged that fiduciaries made imprudent investments in company stock, and breached their duties under ERISA); *Ikon* (Class Cert.), 191 F.R.D. at 465 (commonality met in ERISA breach of fiduciary duty case involving company stock in 401(k) plan). In each of these cases, the courts identified several common questions of law and fact including whether the alleged misrepresentations led employees to

invest in company stock; whether the decision to continue investing the matching portion in company stock "clearly presents a common issue;" *Kmart ERISA* (Class Cert.), 2004 WL 831124, at *4; "whether the investment of the Plans' assets in [company] stock was prudent;" "whether [defendant] was a directed trustee and . . . whether [defendant] acted in accordance with ERISA;" *Dwyer*, 2001 WL 289972, at *3; and "whether the individual defendants were aware of the alleged improprieties committed by Ikon, whether there were conflicts of interest and what actions were taken if there were, whether the defendants took appropriate steps to protect the plan and recover damages, and whether there might be co-fiduciary liability." *Ikon* (Class Cert.), 191 F.R.D. at 464.

Commonality is easily met here as well: plaintiffs allege that defendants' violations of ERISA arise from a common nucleus of operative facts and the putative class has been similarly victimized by the same breaches of fiduciary duty. Common issues of fact and law include:

- Did defendants breach their ERISA fiduciary duties by continuing to offer Enron stock as an investment option for the Plans after it no longer was prudent to do so?
- Did defendants breach their ERISA fiduciary duties by continuing to invest matching contributions in Enron stock when it no longer was a prudent investment for Plans assets?
- Did defendants' communications to participants provide "complete and accurate" information concerning the risks of investing for retirement in Enron stock?
- Did defendants provide false and misleading information, or fail to disclose material information, concerning the financial health of the Company?
- What steps, if any, did defendants take to investigate and monitor whether it was appropriate to continue to offer Enron stock as a retirement vehicle for participants or when the circumstances of the company's financial health began to crumble?
- Did defendants breach fiduciary duties owed to the Class by failing to act prudently and solely in the interest of the Class members and the Plans?

Given these common issues, Rule 23(a)(2) is plainly satisfied.

3. Typicality

The typicality requirement examines whether the proposed Class Representatives have the same interests and seek a remedy for the same injuries as other Class members. *E. Tex.*

Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). However, there is no requirement that the circumstances of the named plaintiffs and the potential class be entirely identical. As long as the class representative's claims are "reasonably coextensive with those of absent class members, typicality is established." *Hanlon*, 150 F.3d at 1020. As the court explained in *James v. City of Dallas*, 254 F.3d 551 (5th Cir. 2001):

> [T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.24[4] (3d ed. 2000).

Id. at 571; *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144, 151 (E.D.N.Y. 1996) (in ERISA breach of fiduciary class action, holding that "[w]hen the same unlawful conduct was directed at both the named plaintiff and the class he seeks to represent, the typicality requirement is usually met 'irrespective of minor variations in the fact patterns underlying individual claims'") (citations omitted).

Likewise, differences in damages among the class members will not defeat typicality. *See, e.g., Olden v. LaFarge Corp.*, 203 F.R.D. 254, 270 (E.D. Mich. 2001) (finding that "[t]he putative class members' claims may differ in the amount of damages due to each individual, but that feature alone is not fatal to a finding of typicality"). As the court explained in *Ikon* (Class Cert.):

> Even if there are significant differences in the damages that may be claimed by those who acquired stock based on misrepresentations and those who held stock based on misrepresentations, both groups must prove the same core issues: whether there were misrepresentations and whether the defendants even acted as fiduciaries.

191 F.R.D. at 465; *Walsh v. Northrop Grumman Corp.*, 162 F.R.D. 440, 445 (E.D.N.Y. 1995) (finding that issue of damages is not germane to Rule 23 inquiry).

Here, the claims of the Named Plaintiffs are sufficiently in line with the claims of other class members. *Dwyer*, 2001 WL 289972, at *3 (finding typicality of claims where the Named

Plaintiff were ERISA plan participants during the class period and the plan's fiduciaries treated all participants alike); *Ikon* (Class Cert.), 191 F.R.D. at 465 (finding typicality of claims where "the named plaintiffs and the putative class would necessarily allege a similar course of conduct: that Ikon and the individual defendants failed to provide accurate information in violation of ERISA obligations"); *Specialty Cabinets*, 140 F.R.D. at 476 ("Plaintiffs have brought this action in part to remedy a breach of fiduciary duty, and any recovery on this claim belongs to the ERISA fund. These claims of the Plaintiffs' are identical to those of other class members").

Furthermore, because of ERISA's unique standing and remedial provisions, each class member seeks and is entitled to obtain plan-wide relief. ERISA § 409(a), 29 U.S.C. § 1109(a) (liability for breach of fiduciary duty is to the plan); ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (authorizing plan participant to sue for breach of fiduciary duty under § 409(a)); *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1463 (9th Cir. 1995), *cert. denied*, 516 U.S. 914 (1995). With each Class member stating the same claim, concerning the same conduct, and seeking the same relief, there can be no real doubt that the claims asserted are sufficiently typical for purposes of Rule 23(a)(3).

4. Adequacy

Rule 23(a)(4) requires that the Named Plaintiffs fairly and adequately protect the interests of the Class they represent. There are two prongs to this requirement: (1) do the Named Plaintiffs and their counsel have any conflicts of interest with other class members; and (2) will the Named Plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *Hanlon*, 150 F.3d at 1020. The first prong largely overlaps with the commonality and typicality requirements of Rule 23(a), and focuses on "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Schatzman v. Talley*, 91 F.R.D. 270, 273 (N.D. Ga. 1981) (citation omitted). The second prong is generally addressed to the qualifications of counsel, and in the context of a settlement-

only class, "an assessment of the rationale for not pursuing further litigation." *Hanlon*, 150 F.3d at 1021. Under the present circumstances, both prongs easily are met.

(a) Class Representatives Interests Do Not Conflict and Are Sufficiently Aligned with the Interests of Absent Class Members

The Named Plaintiffs have sufficient common interests with the absent class members. In fact, the plan-wide nature of the relief sought by plaintiffs clearly unites their interests with those of absent class members. This point was made cogently in *Gruby*, 838 F. Supp. 820. In *Gruby*, the court rejected defendants' argument that ERISA class members' interests diverged where, in fact, all members sought the same "make-whole" relief claimed by the Named Plaintiffs for breach of the defendants' fiduciary duties. *Id.*, at 827. The court noted further that "as any recovery under [ERISA §] 502(a)(2), 29 U.S.C. § 1132(a)(2), goes to the Fund as a whole, and as Fund participants may bring an action only in a representative capacity on behalf of the entire Fund, the proposed class must include all Fund participants." *Id.* (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142, n.9 (1985)). Similarly, in *SmithKline Beecham*, 201 F.R.D. 386, the court explained:

> [B]ecause the named plaintiffs are challenging the same unlawful conduct and seeking the same relief as the rest of the class, I find that the interests of the named plaintiffs are sufficiently aligned with those of the class members to satisfy the first prong of the adequacy of representation requirement. In particular, I note that the right to relief of the named plaintiffs, like that of the absent class members, depends on demonstrating that the defendants violated the terms of the plans, violated provisions of ERISA, and breached their fiduciary duties.

Id. at 396; *see also Kane*, 1998 WL 78985, at *8 (finding adequacy in ERISA case; "plaintiffs seek to have the fiduciaries 'personally restore to the Fund any losses incurred.' . . . The named plaintiffs' interests are the same as those of the absentee class members: all seek to increase the value of the Fund"). Adequacy of the Named Plaintiffs therefore, is established.

(b) Plaintiffs' Counsel Are Competent and Have Vigorously Pursued the Interests of the Class

As discussed previously, Co-Lead Counsel appointed by this Court have extensive experience in representing plaintiffs in ERISA class action litigation, and class action litigation generally. Moreover, as demonstrated by the proposed settlement and the benefits it provides to the class, plaintiffs' counsel has vigorously and effectively pursued the interest of the class. Furthermore, as also explained above, the decision not to pursue further litigation is based on a sound assessment of the evident risks of proceeding weighed against the guaranteed benefits the settlement provides to the class. Therefore, this prong of the adequacy requirement also is satisfied. *See, e.g., SmithKline Beecham*, 201 F.R.D. at 396 (finding class counsel adequate based on the plaintiffs' attorneys' "extensive experience litigating class actions and ERISA actions"); *Hanlon*, 150 F.3d at 1022 (finding the counsel satisfied the adequacy requirement for settlement-only class where their competency was established, and they vigorously pursued the litigation). Therefore, the adequacy requirement of Rule 23(a) is satisfied in this case.

D. The Class Satisfies the Requirements of Rule 23(b)(1)

Because plaintiffs have satisfied the requirements of Rule 23(a), this Court should certify the class if it satisfies one or more of Rule 23(b)'s three subsections. As often has been noted, the additional requirements of Rule 23(b) overlap considerably with those of Rule 23(a), and with each other. 2 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 4.1 (4th ed. 1992).

Here, in light of the substantive law of ERISA, and the other factors discussed herein, the class is appropriate for certification as a non opt-out class under 23(b)(1). Indeed, that is what this Court ordered for the *Tittle* Settlement Class with respect to the ERISA claims in the settlement with AWSC. *See*, Order Preliminarily Approving Settlement, ¶ 6. In fact, given the unique representative nature of a breach of fiduciary duty action under ERISA, some courts have held that an ERISA breach of fiduciary action may be certified ***only*** as a non opt-out class under

(b)(1) or (b)(2). *See, e.g., Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1352-53 (11th Cir. 2001) (rejecting certification of a claim alleging breach of fiduciary duty brought under ERISA § 409 on behalf of the plan under Rule 23(b)(3), and remanding for findings consistent with its ruling that such actions should be maintained under Rule 23(b)(1) or (b)(2)). Other courts have indicated that certification under (b)(3) may also be possible for such actions, however, given the additional burden of a (b)(3) action, it is not preferred. *See, e.g., Specialty Cabinets*, 140 F.R.D. at 477 (explaining that "[u]nlike members of subdivision (b)(1) or (b)(2) classes, members of Rule 23(b)(3) classes have an automatic right to opt, that is, to exclude themselves from the binding effect of the judgment. . . . Because of the additional burden on the parties, courts generally prefer to certify a class under Rule 23(b)(1) or (b)(2) if possible") (citations omitted). Accordingly, plaintiffs seek certification under Rule 23(b)(1).

1. Certification Is Appropriate Under Rule 23(b)(1)

Under Rule 23(b)(1), a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Thus, Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *Ikon* (Class Cert.), 191 F.R.D. at 466.

(a) Subsection (b)(1)(B)

In the context of ERISA breach of fiduciary duty claims, most courts have followed the reasoning of the Federal Rules drafters and concluded that subsection (b)(1)(B) is the most natural and appropriate basis for class certification. *See* Fed. R. Civ. P. 23(b)(1)(B) advisory

committee note (1966 Amendment) (stating that certification under 23(b)(1)(B) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries); *Banyai*, 205 F.R.D. at 165 (granting class certification under subsection (b)(1)(B) and invoking the Advisory Committee Notes).[7]

Plaintiffs' claims are particularly well suited for Rule 23(b)(1) certification by virtue of the substantive law of ERISA. As one court explained:

> Under 29 U.S.C. § 1132(a)(2), participants or beneficiaries of an ERISA plan have standing to sue for appropriate relief under 29 U.S.C. § 1109 (1988), imposing liability for breaches of fiduciary duty. An action to enforce fiduciary duties is "brought in a representative capacity on behalf of the plan as a whole." [*Russell*, 473 U.S. 134, 142 n.9]. Any relief granted by a court to remedy a breach of fiduciary duty "inures to the benefit of the plan as a whole" rather than to the individual plaintiffs. *Id.* at 140. "Because a plan participant or beneficiary may bring an action to remedy breaches of fiduciary duty only in a representative capacity, such an action affects all participants and beneficiaries, albeit indirectly." [*Specialty Cabinets*, 140 F.R.D. at 478]. Since Counts X and XI are brought by Schweizer, Robb and Cashin in their representative capacity, the Court finds that class certification for these claims is proper under Rule 23(b)(1)(B).

Kane, 1998 WL 78985, at *9. The court in *Ikon* made exactly the same point:

> The court agrees that, given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief . . . . There is also risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions.

[7] ERISA breach of fiduciary duty cases granting class certification under subsection (b)(1)(B) include: *Dwyer*, 2001 WL 289972; *SmithKline Beecham*, 201 F.R.D. 386; *Ikon* (Class Cert.), 191 F.R.D. 457; *Bunnion*, 1998 WL 372644; *Kane*, 1998 WL 78985; *Feret*, 1998 WL 512933; *Gruby*, 838 F. Supp. 820; *Specialty Cabinets*, 140 F.R.D. 474.

Ikon (Class Cert.), 191 F.R.D. at 466 (citations omitted). Because of ERISA's distinctive "representative capacity" and remedial provisions, this is a paradigmatic case for class treatment under Rule 23(b)(1)(B).

(b) Subsection (b)(1)(A)

After determining that a class of participants and beneficiaries seeking recovery from an ERISA fiduciary satisfies subsection (b)(1)(B), some courts deem it unnecessary to reach the other potentially applicable subsections of Rule 23(b). *E.g.*, *Dwyer*, 2001 WL 289972, at *5 n.2; *Gruby*, 838 F. Supp. at 828.

Other courts, however, certify ERISA class actions under both subsections (b)(1)(B) and (b)(1)(A). *Kmart ERISA* (Class Cert.), 2004 WL 831124, at *11; *SmithKline Beecham*, 201 F.R.D. at 397; *Ikon* (Class Cert.), 191 F.R.D. at 466; *Bunnion*, 1998 WL 372644, at *13; *Feret*, 1998 WL 512933, at *13-14. Still others choose to rely on subsection (b)(1)(A) alone. *Clauser*, 2000 WL 1053395, at *6; *Montgomery*, 1996 WL 189347, at *5.

In this case, class certification would be proper under both (b)(1)(B) and (b)(1)(A). As the court noted in *Bunnion*:

> We find that the ERISA [claims for breach of fiduciary duties, among others] are appropriate for certification under both [23(b)(1)(A) and (b)(1)(B)]. All of these claims relate to the interpretation and application of ERISA plans. [Defendant] Conrail treated the proposed class and subclass identically and any equitable relief granted will affect the entire class and subclass. Failure to certify a class would leave future plaintiffs without adequate representation. Moreover, we see a high likelihood of similar lawsuits against defendants should this class be denied. . . . Inconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice. While plaintiffs list a variety of relief sought in their amended complaint, ERISA specifically limits the relief available to that of an equitable, that is, declaratory or injunctive, nature. 29 U.S.C. § 1132. To the extent that money damages are awarded or sought, we find them to be incidental.

Bunnion, 1998 WL 372644, at *13. *See also Kmart ERISA* (Class Cert.), 2004 WL 831124, at *11 ("Overall, the Court finds that certification under Rule 23(b)(1) is proper. Certification will

be under (b)(1)(A) and (B)"); *SmithKline Beecham*, 201 F.R.D. at 397 (granting class certification under subsection (b)(1)(A); "the plaintiffs seek broad declaratory and injunctive relief related to defendants' conduct and the terms of the plan. If this relief were granted in some actions but denied in others, the conflicting declaratory and injunctive relief could make compliance impossible for defendants"); *Ikon* (Class Cert.), 191 F.R.D. at 466 (granting certification under (b)(1)(A); "There is also risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions"); *Feret*, 1998 WL 512933, at *13 (granting certification under (b)(1)(A); noting the risk that differing outcomes would make it nearly impossible for the defendants to implement any one result).

Class certification is appropriate under subsection 23(b)(1)(A) in addition to 23(b)(1)(B).

VI. ENTRY OF A BAR ORDER IS APPROPRIATE

A. The Right Of Contribution Under ERISA, And, Thus, The Need For A Bar Order Is Uncertain.

1. The Circuits and district courts within the Fifth Circuit are split as to whether ERISA provides for a right of contribution among breaching co-fiduciaries.

The Settlement Agreement contains a bar order provision that provides a judgment credit to the non-settling parties that compensates the non-settling defendants for the loss of any contributions claims they may have against the settling defendants. When assessing the fairness of this provision, it is first necessary to recognize that under ERISA it is debatable whether the non-settling defendants in fact have the right to seek contribution from the settling defendants for damages assessed against them for breach of their fiduciary duties. There is a split of authority among the few circuits that have directly addressed this issue. The Second and Seventh Circuits have decided the issue in favor of the contribution. *See Chemung Canal Trust Co. v. Sovran*

Bank/Md., 939 F.2d 12, 15 (2d Cir. 1991) (finding right of contribution under ERISA); *Free v. Briody*, 732 F.2d 1331, 1337-38 (7th Cir. 1984) (finding right of indemnification under ERISA).

On the other hand, the Ninth Circuit has strongly rejected the availability of contribution among fiduciaries who breach their duties under ERISA. In *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989), the court concluded that there was no right of contribution for breaching fiduciaries under ERISA. As an initial premise, the court noted that in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 141-42 (1985), the Supreme Court found that ERISA § 409, 29 U.S.C. § 1109, only establishes remedies for the plan, and, therefore, cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary. *Fujikawa*, 871 F.2d at 1432. The court also noted that in *Russell*, the Supreme Court reasoned that "in light of 'ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute,'" it seems clear that 'Congress did *not* intend to authorize other remedies [under ERISA] that it simply forgot to incorporate expressly.'" *Fujikawa*, 871 F.2d at 1432 (citing *Russell*, 473 U.S. at 146)(citations omitted).

The court found that implying a right of contribution under ERISA would be "particularly inappropriate" since the party seeking contribution "is a member of the class [e.g. fiduciaries] whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class [e.g., ERISA plans],' and where there is no indication in the legislative history 'that Congress was concerned with softening the blow on joint wrongdoers.'" *Fujikawa*, 871 F.2d at 1433 (citations omitted); *and see May v. Nat'l Bank of Commerce*, No. 03-2112 Slip. op. At 6-7 (M.D. Tenn. Feb. 27, 2004) (discussing split of authority and holding that the Ninth's Circuit's view "is more consistent with ERISA's statutory scheme, which is designed to protect beneficiaries and participants of employee benefit plans . . . .").[8]

[8] The *May* decision is attached hereto as Exhibit G.

The Fifth Circuit has not weighed on whether there is a right to contribution under ERISA, and there is a split among the district courts in the circuit. In *Maher v. Strachan Shipping Co.*, 817 F. Supp. 43, 44-5 (E.D. La. 1993), the district court recognized the split of authority among the other circuits, as well as the absence of Fifth Circuit precedent on the issue. *Id.* at 44 (noting that the Fifth Circuit "has not expressly decided whether co-fiduciaries can receive indemnification and contribution"). However, the court sided with the Second Circuit's analysis. On the other hand, in *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771, 791 (S.D. Miss. 1992), the court cited with approval the Ninth Circuit's *Fujikawa* decision as support for its determination that indemnity is unavailable under ERISA. Thus, within the Fifth Circuit as well, any right of contribution that the non-settling parties may claim in this case is at best a toss up.

B. Bar Orders Are Routinely Entered By Federal Courts In Complex Cases

Leaving aside the issue of whether contribution is available in this case, many courts have noted that absent a bar order, defendants in multi-party litigation have little reason to settle with plaintiffs. As the court recognized *In re Masters Mates & Pilots Pension Plan & IRAP Litigation,* 957 F.2d 1020, 1028 (2d Cir. 1992), "[i]f a non-settling defendant against whom a judgment had been entered were allowed to seek payment from a defendant who had settled, then settlement would not bring the latter much peace of mind."

In order to reduce this disincentive to settle, federal courts generally allow for bar orders in multi-party settlement agreements that extinguish the right of non-settling defendants to obtain contribution from settling defendants. *FDIC v. Geldermann, Inc.* 975 F.2d 695, 698 (10th Cir.1992) (citing *In re Masters Mates,* 957 F.2d at 1031-32 (ERISA action)); *In re Jiffy Lube Sec. Litig.,* 927 F.2d 155, 160 (4th Cir.1991) (securities litigation); *Franklin v. Kaypro,* 884 F.2d 1222, 1229 (9th Cir. 1989)(securities litigation). Because such orders affect the rights of parties to the litigation who are not also parties to the settlement, courts must determine whether the settlement is fair to those affected non-settling parties. *Masters Mates,* 957 F.2d at 1228. In causes of action for which contribution rights in fact exist among defendants, courts generally

agree that in order to be fair to non-settling defendants, bar orders must contain some form of "judgment reduction" provision. A judgment reduction provision enables the non-settling defendants to reduce any judgment against them in light of the settlement with the other defendants. *Id.* The two most commonly applied forms of judgment reduction are the "proportionate fault" method, and the "*pro tanto*" method.

1. The proportionate fault approach produces unfair results where the settling parties lack funds to satisfy their full share of liability.

Under the proportionate fault method, the jury assesses the relative culpability of both the settling and non-settling defendants, and the non-settling defendants pay a commensurate percentage of the judgment. *Masters Mates*, 957 F.2d at 1029. While some courts have favored a proportionate share set off in bar order provisions, there are, several well-recognized problems with the proportionate share approach. As the court explained *In re Masters Mates* itself:

> "The problem with the proportionate method is that a holdout defendant can make settlement difficult for the plaintiffs, who bear the risk of a bad settlement. The proportionate method also makes it difficult for a district court to frame notice to a plaintiff class. Because the amount of setoff is not determined until after trial, it is difficult adequately to convey to a class the worthiness of a proposed settlement. Moreover, determining the relative fault of each party imposes a considerable burden on a factfinder and "obviate[s] much of the advantage of partial settlement to the judicial system."

Id. (citations omitted).

Another problem with the proportionate share approach is that it can prevent plaintiffs from obtaining a full recovery or even anything close to a full recovery. This is because a proportionate share set off, strictly applied, does not take into account the ability to pay of the settling defendants. Thus, if a settling and non-settling defendant are each found 50% liable on a one million dollar claim, but the settling defendant only has $100 dollars to his name, the non-settling defendant will be able to reduce the judgment against him by $500,000. As a result, the plaintiff only would recover $500,900. This is particularly unfair to the plaintiff because had

there been no settlement at all, the contribution "right" of the non-settling defendant against the settling defendant would be worth a grand total of $100. Hence, where the settling defendants lack the resources to satisfy the full extent of their liability, the strict proportionate share set off would put the non-settling defendant in a far better position than he would have been in absent any settling at all.

This shortcoming has been recognized by commentators, particularly in the class action securities context. As noted in an article prepared for the American Law Institute:

> A serious problem with the proportionate fault rule is that it limits the feasibility of partial settlements with defendants who are highly culpable but have limited resources. Under the *pro tanto* approach, plaintiff can settle with such a defendant for an amount which fairly reflects that defendant's ability to pay, without concern that the settlement will eviscerate the potential recovery at trial from the remaining defendants. Under the proportionate fault rule, in contrast, settlement with an impecunious but highly culpable defendant would reduce the amount which can be recovered from the other defendants at trial by an amount reflecting the settling defendant's relative culpability. If the settlement is small because of the highly culpable defendant's lack of assets, the reduction in the non-settling defendants' potential liability may far exceed the settlement proceeds received from the settling defendant.
>
> Such a result seems inappropriate, both because it contradicts the strong public interest in encouraging reasonable settlements, and because it conflicts with the rule that joint tortfeasors are jointly and severally liable to plaintiff for the full amount of his damages. If a plaintiff secured a judgement against all defendants at trial and one highly-culpable defendant had no resources, the other less-culpable defendants would remain liable to plaintiff for the full amount of the judgement, notwithstanding their practical inability to obtain contribution from the insolvent defendant for his proper share of the damages. In light of the foregoing, the Ninth Circuit erred in *Kaypro* when it stated that under the pro tanto approach, "plaintiffs could effect low settlements with defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial." [Kaypro] 884 F.2d at 1230 (emphasis in original). To the contrary, if all defendants were found liable at trial, joint and several liability would result, and each defendant would be liable to pay all of the judgement, retaining only the problematic right to seek contribution from defendants with limited resources.

Jerome M. Congress & William Appleby-Kellett, CONTRIBUTION BAR ORDERS IN MULTI-PARTY SETTLEMENTS, C735 ALI-ABA 341, 352-53 (1992).

The same concerns apply in the ERISA context in light of the express provision for joint and several liability under ERISA for breaching fiduciaries. As Judge Coffey noted in his concurrence in *Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985), "[t]he purpose of imposing joint and several liability upon co-trustees is to ensure that the plaintiff 'will be able to recover the ***full amount*** *of damages* from some, if not all, participants.'" *Id.* (emphasis added) (citing *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 646 (1981). This feature of ERISA, and the underlying purpose of the statute to protect plan assets, and make participants whole for losses caused by plan fiduciaries, distinguishes ERISA from some other contexts in which the proportionate share approach has been endorsed, such as admiralty law.[9]

2. Under the unique and devastating circumstances of the Enron case, a *Pro Tanto*-based judgment credit is appropriate.

The *pro tanto* rule reduces a non-settling defendant's liability for a judgment against him in the amount paid by the settling defendants. *In Re Master Mates*, 957 F.2d at 1029. One virtue of the *pro tanto* rule is its simplicity – unlike proportionate fault, it is not difficult to determine the amount of the reduction. Another virtue is that it ensures that Plaintiffs obtain a complete recovery, and ***nothing more***. The *pro tanto* approach has been criticized because under certain circumstances, "it can result in a judgment reduction that is inconsistent with proportionate fault." *Id.* Moreover, courts have expressed concern that the rule can encourage collusion between a plaintiff and a "favored joint tortfeasor." *Id.*; *In re Exxon Valdez*, No. 89-00951993 WL 649104, at *3 (D. Alaska, Dec. 8, 1993). However, these criticisms lack force here. First, the fact that non-settling Defendants may pay more than what they perceive as their proportionate share of damages is, in fact, the *status quo ante* in this case, for the simple reason

[9] In addition, the Manual for Complex Litigation, recognizes that the limited resources of defendants can play a role in assessing the fairness of a partial settlement. Manual for Complex Litigation (Second) § 30.46 at 244-45 (1985) ("[a] partial settlement providing little relief may be entirely satisfactory if the settling defendant has strong defenses *or is impecunious*.") (emphasis added).

that the Administrative Committee Defendants lack the means to come anywhere close to satisfying the full judgment that may ultimately be entered against them.[10] Thus, as noted above, without any settlement at all, the non-settling Defendants with means would be on the hook for any portion of the damages for which they are jointly and severally liable that their co-Defendants cannot pay. Second, as also noted above, the settlement has been the result of over two years of arm's length negotiations among counsel who have vigorously represented their clients' interests. Any suggestion of collusion would be, thus, completely unfounded.

3. The bar order provision in the Settlement Agreement is fair to *all* parties in this action

Here, the Settlement Agreement structures the bar order judgment credit in a manner that ensures fairness to all of the parties. The Settlement Agreements provides a judgment credit equal to the settlement amount (*pro tanto*) paid by the settling parties. In addition, the agreement provides any non-settling Defendant who is a potential insured under the Plans' fiduciary liability policies with an additional $10 million judgment credit over an above the $85 million policy limit (SA ¶¶ 2.5.3-2.5.4) – such $10 million representing more than any amount of insurance proceeds that the non-settling defendants might conceivably have been able to claim by way of an allocation of the policy among all the insureds. *Id.* The Settling Parties have included that provision in the proposed bar order to remove any doubt as to the fairness of exhausting the fiduciary liability insurance policies on the settlement. Thus, when considering all of the unique circumstances of this case: the fact that under ERISA contribution may not be available at all to the non-settling Defendants; the devastating losses suffered by the Plans' participants and beneficiaries; the limited ability to pay of the Administrative Committee

[10] As part of the negotiation process, the Settling Defendants provided information regarding their financial resources. Based on their review of this information, Plaintiffs determined that the Administrative Committee Defendants collective personal resources paled in comparison to the Settlement Amount ($85 million). Although the Director Defendants have more significant means, Plaintiffs' claims against the Directors are based principally on their failure to monitor the Plan fiduciaries they appointed: they have not been sued directly for a failure to prudently manage the Plans' assets. *See, e.g., Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1466 n. 10 (4th Cir. 1996) (discussing limitations of liability under monitoring claims); *but see* in *Leigh v. Engle*, 727 F.2d 113, 135 (7th Cir. 1984).

Defendants, and the undeniable fact that in the absence of any settlement, under basic principles of joint and several liability, Defendants with means would be required to pay their proportionate share as well as that of their co-fiduciaries who lack the funds to do so, it is clear that the bar order provision in the agreement is fair, adequate and reasonable to all parties. Indeed, under the circumstances, it is the fairest possible resolution of the parties' conflicting interests.

VII. APPROVAL OF THE SETTLEMENT AGREEMENT DESPITE ITS PROVISION FOR AN INTERPLEADER OR SIMILAR ACTION IS APPROPRIATE

The Settlement Agreement specifically recognizes that the Underwriters may, instead of contributing funds to the Settlement Trust, file an action in the nature of an interpleader to assure the propriety of exhausting policy limits to fund the settlement of the majority, but not all, of their insureds. SA ¶ 8.6.

Despite the practical reasons the Underwriters may have for filing such an action, under Texas law, an insurer is not required to provide funds for all of the insureds before exhausting policy limits. *See, e.g., Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999) (applying Texas law and allowing a reasonable settlement that exhausts the policy and leaves a co-insured without coverage); *Am. States Ins. Co. of Tex. v. Arnold*, 930 S.W.2d 196 (Tex. App. 1996) (finding that an insurer may settle for policy limits on behalf of named insured, leaving additional insured without coverage). Thus, an insurer's refusal of a reasonable settlement offer exposes it to liability under Texas law. *See, e.g., Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848-49 (Tex. 1994) (holding that an insurer defending its policyholder on an covered claim must accept a settlement offer within policy limits when an "ordinarily prudent insurer" would do so in light of the insured's potential exposure to a judgment in excess of policy limits).

As evident in the discussion in *Travelers,* the coverage issue that will be presented by any claim the Non-Settling Defendants make to policy proceeds is almost exclusively a legal issue such that the only relevant facts are whether the "settlement offer [is] reasonable" and whether

the Settling Defendants "reasonably fear liability over policy limits." *Travelers*, 166 F.3d at 767, 764-68. As demonstrated by the analysis of the potential damages in this memorandum, the settlement offer was reasonable. Similarly, the Settling Defendants' reasonable fear of liability over policy limits is evident from the Court's denial of their motions to dismiss, regardless of the benchmark for damages discussed previously.

Pursuant to the terms of the Settlement Agreement, for the settlement to become final and unconditional, one of two results of any action in the nature of an interpleader must occur: (1) the interpleader Court must enter an order allowing the funding of the full $85 million policy limits for the benefit of the Settling Defendants; or (2) the Settling Parties may amend the Settlement Agreement to be consistent with any order of the interpleader Court that does not allow the funding of the full $85 million for the benefit of the Settling Defendants. SA ¶ 2.11. The Settlement Agreement that was bargained for by the plaintiffs is $85 million and they are not required to proceed with this settlement if those funds are not ultimately made available.

There are several reasons why the prospect of any such action should not preclude the Court's determination that this Settlement Agreement is fair and reasonable for the purpose of preliminary approval. First, any such action will be susceptible to summary disposition. In fact, interpleaders to determine competing rights to benefits are frequently the subject of summary judgment. *See, e,g., Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999) (summarily resolving interpleader to determine rights to ERISA benefits); *Guardian Life Ins. Co. of Am. v. Finch*, No. 03-1225, 2004 WL 86293 (N. D. Tex. Jan. 16, 2004) (summary judgment disposing of interpleader to determine entitlement to ERISA life insurance policy benefits). Similarly, any action to resolve the use of policy proceeds in this case will present an issue of law that will not require a lengthy process to resolve.

Second, even if such an action is filed after preliminary approval and is not resolved before the final approval hearing, the Court can under the terms of the Settlement Agreement and the forms of Proposed Notice, reschedule the hearing for a time after it is resolved. SA ¶ 2.3.3.

In fact, the Settlement Agreement contemplates that the Settling Parties will cooperate to remove any such action for consolidation with the *Tittle* action before this Court. SA ¶ 5.2.2.

VIII. CONCLUSION

The settlement, which is the result of extensive negotiations by the parties, provides substantial benefits to the Class and fully, fairly, and favorably resolves plaintiffs' claims. For these and the other foregoing reasons, the Named Plaintiffs request that the Court certify the class for settlement purposes, preliminarily approve the settlement and, following the issuance of notice and the fairness hearing, approve the settlement on a final basis.

Respectfully submitted this 11th day of MAY, 2004.

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2004, a true and correct copy of the foregoing document was served upon all known counsel of record via the http://www.esl3624.com web site, or as otherwise indicated pursuant to the Court's April 10, 2002, Order Regarding Service of Papers and Notice of Hearings.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al.,	)	
	)	
Plaintiffs,	)	No. H 01-CV-3913
	)	
v.	)	(Consolidated Action)
	)	
ENRON CORP., et al.,	)	
	)	
Defendants.	)	
	)	

CLASS ACTION SETTLEMENT AGREEMENT

This CLASS ACTION SETTLEMENT AGREEMENT ("Settlement Agreement") is entered into by and between Named Plaintiffs in the *Tittle Action*, for themselves and on behalf of the Settlement Class, on the one hand, and the Settling Defendants, on the other. Named Plaintiffs and the Settling Defendants are referred to collectively in this Settlement Agreement as the "Settling Parties." Capitalized terms and phrases have the meanings provided in Section 1 below.

RECITALS

WHEREAS, Named Plaintiffs commenced the *Tittle Action* asserting various claims for relief against the Settling Defendants and others;

WHEREAS, the Settling Defendants filed motions to dismiss each and every one of Named Plaintiffs' allegations of wrongdoing and unlawful or improper conduct by the Settling Defendants;

WHEREAS, Named Plaintiffs opposed the Settling Defendants' motions to dismiss;

WHEREAS, the motions to dismiss were denied in whole or in part as to the ERISA claims against each of the Settling Defendants in the opinion issued by the Court on September 30, 2003 (*In Re Enron Corporation Securities, Derivative & ERISA Litigation,* 284 F. Supp. 2d 511 (S.D. Tex. 2003)).

WHEREAS, the Settling Parties are desirous of promptly and fully resolving and settling with finality all of Plaintiffs' Released Claims against the Settling Defendants;

WHEREAS, to accomplish that goal, the Settling Parties have reached a settlement by and through their respective undersigned counsel on the terms and conditions set forth in this Settlement Agreement.

NOW, THEREFORE, the Settling Parties, in consideration of the promises, covenants and agreements herein described and for other good and valuable consideration acknowledged by each of them to be satisfactory and adequate, and intending to be legally bound, do hereby mutually agree as follows:

1. DEFINITIONS

As used in this Agreement, capitalized terms and phrases not otherwise defined have the meanings provided below:

1.1 "Administrative Committees" shall mean: collectively, the Administrative Committee for the Enron Savings Plan; the Administrative Committee for the Enron ESOP; and the Administrative Committee for the Enron Cash Balance Plan, and all other administrative committees established for any and all other Enron Plans, including all predecessors and successors to any such committees.

1.2 "Administrative Committee Members" shall mean: all Persons who served at any time as members of any or all of the Administrative Committees, as well as their predecessors, Successors-In-Interest and Representatives.

1.3 "Administrative Committee Settling Defendants" shall mean: the Administrative Committees and the Administrative Committee Members, including the Persons specified on Schedule 1.3.

1.4 "Affiliate" shall mean: any entity which owns or controls, is owned or controlled by, or is under common ownership or control with, a Person. For purposes of this definition, "control" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or otherwise.

1.5 "Agreement Execution Date" shall mean: the date on which this Settlement Agreement is fully executed, as provided in Section 12.14 below.

1.6 "Amended Complaint" shall mean: the Second Consolidated and Amended Complaint, filed or about January 2, 2004, in the *Tittle Action.*

1.7 "Bankruptcy Court" shall mean: the U.S. Bankruptcy Court for the Southern District of New York.

1.8 "Bankruptcy Proceeding" shall mean: the Chapter 11 voluntary proceeding filed in the Bankruptcy Court by Enron Corporation on or about December 2, 2001.

1.9 "Barred Persons" shall have the meaning specified in Section 2.5.2 below, including, among others, Northern Trust, Enron Corp., and all other Non-Settling Defendants.

1.10 "Class Counsel" shall mean: Lynn Lincoln Sarko, Esq. of Keller, Rohrback, LLP and Steve W. Berman, Esq. of Hagens Berman, LLP.

1.11 "Class Settlement Amount" shall mean: the amount contributed to the Settlement Trust by the Underwriters, and certain Settling Defendants pursuant to Sections 8.2.1 and 8.2.2 below, and as defined in Section 8.2.3.

1.12 "Court" shall mean: the United Stated District Court for the Southern District of Texas (Houston Division).

1.13 "Defendant Releasees" shall mean: the Administrative Committee Releasees, the Officer and Director Releasees and the Underwriter Releasees, all as defined in Section 4.1 below.

1.14 "Defendants' Released Claims" shall have the meaning set forth in Section 4.3.

1.15 "Effective Date of Settlement" shall mean: the date on which all of the conditions to settlement set forth in Article 2 of this Settlement Agreement have been fully satisfied or waived and the Settlement shall have become Unconditional, as defined in Section 2.1.

1.16 "Enron" shall mean: Enron Corp., and each of its Affiliates, as well as each of its and their predecessors and Successors-In-Interest, and each of its predecessors and Successors-in-Interest.

1.17 "Enron Cash Balance Plan" shall mean: the Enron Corp. Cash Balance Plan, and any and all predecessors and successors to such plan.

1.18 "Enron ESOP" shall mean: the Enron Corp. Employee Stock Ownership Plan, and any and all predecessors and successors to such plan.

1.19 "Enron Fiduciary Liability Policies" or the "Policies" shall mean: Enron's Fiduciary and Employee Benefit Liability Insurance Policies issued by Associated Electric & Gas Insurance Services Limited ("AEGIS"), as Primary Carrier (Policy Number F0079A1A99), and Federal Insurance Company ("FIC"), as Excess Carrier (Policy Number 8146-41-84A BHM).

1.20 "Enron Plans" shall mean: collectively, (a) the Enron Savings Plan, (b) the Enron ESOP and (c) the Enron Cash Balance Plan, as well as any other employee benefit plan, retirement program, compensation program or deferred compensation program established, maintained, sponsored, or contributed to by Enron (including, but not limited to, any such plan or program referred to in the *Tittle Action* Amended Complaint, as it may have been, or may be, amended from time to time), including any trusts that have funded any such plan or program established by Enron, and any and all predecessors and successors to any and all such plans.

1.21 "Enron Plan Trustees" shall mean: Wilmington Trust Company, as Trustee for the Enron Savings Plan and for the Enron ESOP, and The Bank of New York, as Trustee for the Enron Corp. Cash Balance Plan, on behalf of themselves, on behalf of each of the respective Enron Plans and on behalf of such Plan's respective representatives, employees, participants, beneficiaries and alternate payees. The phrase "Enron Plan Trustees" shall include any and all of their predecessors and Successors-In-Interest.

1.22 "Enron Savings Plan" shall mean: the Enron Corp. Savings Plan, and any and all predecessors and successors to such plan.

1.23 "Final" shall mean: with respect to any judicial ruling or order, that the period for any appeals, petitions, motions for reconsideration, rehearing or certiorari or any other

proceedings for review ("Review Proceeding") has expired without the initiation of a Review Proceeding, or, if a Review Proceeding has been timely initiated, that there has occurred a full and final disposition of any such Review Proceeding, including the exhaustion of proceedings in any remand and/or subsequent appeal on remand.

1.24 "Immediate Family" shall mean: parents, grandparents, children and grandchildren.

1.25 "Independent Fiduciary" shall mean: State Street Bank and Trust Company, which was appointed by Enron pursuant to an agreement with the U.S. Department of Labor (which agreement was approved by the Bankruptcy Court), and which assumed responsibility on or about April 19, 2002, as the independent fiduciary for the Enron Plans.

1.26 "Named Plaintiffs" shall mean the following persons, as plaintiffs on behalf of themselves and on behalf of all members of the Settlement Class: Pamela M. Tittle, Thomas O. Padgett, Gary S. Dreadin, Janice Farmer, John L. Moore, Betty J. Clark, Patrick Campbell, Fanette Perry, Charles Prestwood, Roy Rinard, Steve Lacey, Catherine Stevens, Roger W. Boyce, Wayne M. Stevens, Norman L. Young, Michael L. McCown, and Dan Shultz, and each of their Successors-In-Interest. Whether or not expressly stated herein, Named Plaintiffs intend that all rights and obligations that are binding on Named Plaintiffs under this Settlement Agreement, including each and every covenant, agreement, and warranty, also shall be binding on all members of the Settlement Class.

1.27 "*Newby Action*" shall mean: the action proceeding as a consolidated class action captioned Newby, et al. v. Enron Corp., et al., No. H 01-CV-3624 U.S. District Court (S.D. Tex.).

1.28 "Non-Settling Defendants" shall mean all Persons who are defendants in the *Tittle Action* but who are not, by means of this Settlement Agreement, settling any pending claims against them arising under the Amended Complaint.

1.29 "Officer and Director Settling Defendants" shall mean: the Persons specified on Schedule 1.29.

1.30 "Order of Final Approval" shall mean: the Order of Final Approval of Class Action Settlement and Bar Order contemplated under Section 2.4 of this Settlement Agreement.

1.31 "Person" shall mean: an individual, partnership, corporation or any other form of organization.

1.32 "Plaintiff Releasees" shall have the meaning set forth in Section 4.3.

1.33 "Plaintiffs' Released Claims" shall mean: the Administrative Committee Released Claims, the Officer and Director Released Claims and the Underwriter Released Claims, all as defined in Section 4.2 below.

1.34 "Related Actions" shall mean: (a) the *Newby Action*, and (b) any other action, or threatened action, brought by any or all of the parties in the *Newby Action* seeking recovery on the basis of the transactions and events giving rise to the *Newby Action* or the *Tittle Action*.

1.35 "Representatives" shall mean: representatives, attorneys, agents, directors, officers, employees, insurers and reinsurers.

1.36 "Settlement" shall mean: the settlement to be consummated under this Settlement Agreement pursuant to the Order of Final Approval and Bar Order.

1.37 "Settlement Class" shall mean: collectively, (a) all Persons who were at any time participants in any of the Enron Plans during the period starting on January 1, 1995 through and including the Effective Date of Settlement; and (b) as to each Person within the scope of subsection (a) of this Section 1.37, his, her or its beneficiaries, alternate payees, Representatives and Successors-In-Interest, provided, however, that the "Settlement Class" shall not include (1) any Defendant in the Tittle Action, or any of their immediate family members, beneficiaries, alternate payees, Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were Participants in any Enron Plan, who shall be considered members of the Settlement Class with respect to their own Enron Plan Accounts, and (2) shall not include the Defendant Releasees who were Administrative Committee Members or Enron Officers or Directors during the Class Period or any of their immediate family members, beneficiaries, alternate payees, Representatives or Successors-In-Interest, except for spouses and immediate family members who themselves are or were Participants in any Enron Plan, who shall be considered members of the Settlement Class with respect to their own Enron Plan Accounts..

1.38 "Settling Defendants" shall mean: collectively, (a) the Administrative Committee Settling Defendants, and (b) the Officer and Director Settling Defendants.

1.39 "Successor-In-Interest" shall mean: a Person's estate, legal representatives, heirs, successors or assigns.

1.40 "*Tittle Action*" shall mean: Tittle, et al. v. Enron Corp. et al., Civil No. H 01-CV-3913 (Consolidated Action), an action pending in the United Stated District Court for the Southern District of Texas (Houston Division), and any and all cases now or hereafter consolidated therewith.

1.41 "Underwriters" shall mean: Associated Electric & Gas Insurance Services Limited ("AEGIS"), as Primary Carrier (Policy No. F0079A1A99), and Federal Insurance Company ("FIC"), as Excess Carrier (Policy No. 8146-41-84A BHM), for Enron's Fiduciary and Employee Benefit Liability Insurance Policies with respect to the policies identified in this paragraph.

2. CONDITIONS TO EFFECTIVENESS OF THE SETTLEMENT

2.1 Effectiveness of Settlement. The Settlement provided for in this Settlement Agreement shall not become final and unconditional ("Unconditional") unless and until each and every one of the following conditions in Sections 2.2 through 2.11 shall have been satisfied or waived.

2.2 Class Certification for Purposes of Settlement.

2.2.1 The Court shall have certified this action as a class action for settlement purposes pursuant to Rule 23 (a)(1) - (4), 23 (b)(1) or (2) and 23(e) of the Federal Rules of Civil Procedure, with Named Plaintiffs as the named Class Representatives, with Lynn Lincoln Sarko, Esq. of Keller, Rohrback, LLP and Steve W. Berman, Esq. of Hagens, Berman, LLP as Class Counsel, and with a "Settlement Class" defined as set forth in Section 1.37 above.

2.2.2 The Settling Parties have agreed to stipulate to a certification of the *Tittle Action* as a class action for settlement purposes on the foregoing terms. The Settling Parties have further agreed that if the Settlement does not become Unconditional within the meaning of Section 2.1, then no Settlement Class will be deemed to have been certified by or as a result of this Settlement Agreement, and the *Tittle Action* will for all purposes with respect to the Settling Parties revert to its status as of the day immediately before the Agreement Execution Date. In such event the Settling Defendants will not be deemed to have consented to the certification of any class, the agreements and stipulations in this Settlement Agreement concerning class definition or class certification shall not be used as evidence or argument to support class certification or class definition, and the Settling Defendants will retain all rights to oppose class certification, including certification of a class identical to that provided for in this Settlement Agreement for any other purpose.

2.3 Court Approval. The Settlement contemplated under this Settlement Agreement shall have been approved by the Court, as provided for in this Article 2. The Settling Parties agree jointly to recommend to the Court that it approve the terms of this Settlement Agreement and the Settlement contemplated hereunder. The Settling Parties agree to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement, and any other steps or efforts which may become necessary by order of the Court (unless such order modifies the terms of this Settlement Agreement) or otherwise, to carry out this Settlement Agreement, including the following:

2.3.1 Motion for Preliminary Approval of Settlement and of Notices. As soon as reasonably possible upon the full execution of this Settlement Agreement by the Settling Parties, Named Plaintiffs will file a motion ("Preliminary Motion") with the Court for an order:

(a) Preliminarily approving the Settlement embodied in this Settlement Agreement;

(b) Directing the time and manner of notice to the Settlement Class with respect to this Settlement (the "Class Notice");

(c) Finding (i) that the proposed form of Class Notice fairly and adequately: (A) describes the terms and effect of this Settlement Agreement and of the Settlement; (B) gives notice to the Settlement Class of the time and place of the hearing of the motion for approval of the Settlement; and (C) describes how the recipients of the Class Notice may object to approval of the Settlement, and (ii) that the proposed manner of communicating the notice to the members of the Settlement Class is the best notice practicable under the circumstances;

(d) Directing the time and manner of notice with respect to the claims bar order (the "Claims Bar Notice);

(e) Finding (i) that the proposed form of the Claims Bar Notice fairly and adequately: (A) describes the terms and effect of this Settlement Agreement and of the Bar Order; (B) gives notice of the time and place of the hearing of the motion for approval of the Settlement and of the Bar Order; and (C) describes how the recipients of the Claims Bar Notice may object to approval of the Settlement and to entry of the Bar Order, and (ii) that the proposed manner of communicating the Claims Bar Notice to the Persons listed in Section 2.3.2(b) is the best notice practicable under the circumstances;

(f) Determining what costs of Class Notice should be disbursed to Class Counsel from the Settlement Trust; and

(g) Directing that any Persons insured under the Enron Fiduciary Liability Policies who are not Settling Defendants file with the Court any objections that they may have to this Settlement Agreement, including to use of the policy limits of the Enron Fiduciary Liability Policies as contemplated under this Settlement Agreement.

2.3.2 Issuance of Class Notice and Bar Order Notice. On the date and in the manner set by the Court in its Preliminary Approval of Settlement, the Named Plaintiffs shall:

(a) Cause notice of the preliminary approval of this Settlement to be delivered to the Settlement Class in the form and manner approved by the Court, and

(b) Cause notice of the preliminary approval of this Settlement and of the proposed Bar Order to be delivered to the following Persons (to the extent that such Persons are not already included in the Class Notice):

(i) All of the Settling Parties;

(ii) All of the members of the Settlement Class;

(iii) All Non-Settling Defendants in the *Tittle Action*;

(iv) Named Plaintiffs in the *Newby Action*, and all of the parties in the other Related Actions;

(v) Any Person against whom Named Plaintiffs have asserted a claim based upon any of the events or transactions giving rise to the *Tittle Action* or any of the Related Actions;

(vi) The Bankruptcy Court;

(vii) All parties of record in the Bankruptcy Proceeding;

(viii) The Secretary of the U.S. Department of Labor;

(ix) The Underwriters as defined in this Agreement;

(x) To the extent not included in any previous category, every Person who is an insured under the Enron Fiduciary Liability Policies, to the extent their identity is known by Class Counsel; and

(xi) Every Person currently acting as a fiduciary to the Enron Plans, to the extent their identity is known by Class Counsel.

In addition, Named Plaintiffs will give Class Notice and Bar Order Notice by publication in the Houston Chronicle, in The Wall Street Journal, in The Oregonian, in the Omaha World-Herald, and on Class Counsel's web site(s).

2.3.3 The Fairness Hearing.

(a) On the date set by the District Court in its Preliminary Approval of Settlement, the Settling Parties shall participate in the hearing (the "Fairness Hearing") at which the Court will determine: (i) whether the proposed Settlement between the Settling Parties on the terms and conditions provided for in this Settlement Agreement, is fair, reasonable and adequate

and should be approved by the Court in settlement of the Class Action; (ii) whether Judgment(s) should be entered herein as to the respective Settling Defendants; (iii) whether a bar order satisfying all of the terms of Section 2.5 below (the "Bar Order") should be entered; (iv) whether the distribution of the Class Settlement Amount as provided in the Settlement Agreement should be approved; and (v) what legal fees and further expenses should be awarded to Class Counsel and other attorneys who represent Class members.

(b) The Settling Parties covenant and agree that they will reasonably cooperate with one another in obtaining an acceptable Order at the Fairness Hearing and will not do anything inconsistent with obtaining such an Order.

2.3.4 Motion for Order of Final Approval of Class Action Settlement and Issuance of Bar Order. On the date set by the District Court in its Preliminary Approval of Settlement, Named Plaintiffs shall file a motion for issuance of an Order of Final Approval of Class Action Settlement and for Issuance of Bar Order (the "Final Motion"). The Final Motion shall seek the Court's finding either (1) that the Final Approval Order is a final judgment under Fed. R. Civ. P. 54(b), and that there is no just reason for delay, or (2) that the Court's final approval of the settlement constitutes a final decision under 28 U.S.C. § 1291, including, but not limited to, the collateral order doctrine. If the Court does not make such a finding and any Person asserts that under 28 U.S.C. §§ 1292(a)(1), 1292(a)(2), and 1292(b), the Final Approval Order constitutes an interlocutory order and involves controlling questions of law, and that an immediate appeal may materially advance ultimate termination of the litigation, no Settling Party shall contest such assertion. The Settling Parties agree to support entry of the order approving the settlement as a final judgment. The Settling Parties agree not to contest the contention, if made by any Person, that the order will be appealable upon its entry regardless of which of the above statutory bases apply.

2.4 Finality of Order of Final Approval of Settlement. The Court shall have issued the Order of Final Approval of Class Action Settlement and Bar Order, and the Order shall have become Final.

2.5 The Bar Order. The Court shall have issued a Bar Order that meets all of the following requirements of this Section 2.5 of this Settlement Agreement. The Bar Order shall:

2.5.1 Approve the Bar Order as fair to (a) the Settling Parties; (b) the Settlement Class; and (c) the Non-Settling Defendants;

2.5.2 Bar all claims against the Defendant Releasees for indemnity, for contribution and for any other claims arising out of or concerning any of the Claims released under this Settlement Agreement against the Defendant Releasees (the "Barred Claims") and enjoin any Person receiving notice, or having actual knowledge, of the Final Motion and Request for Final Judgment and Bar Order (such Persons, the "Barred Persons") from bringing, either derivatively or on behalf of themselves, or through any Person purporting to act on their behalf or purporting to assert a claim under or through them, any Barred Claims against the Defendant Releasees in any forum, action or proceeding of any kind;

2.5.3 Provide that because the Barred Persons are barred from asserting any Barred Claims against the Defendant Releasees, any judgments entered against the Barred Persons under Counts I through VI of the Amended Complaint in the Tittle Action (as such counts currently exist or may be amended, and including any future claims under ERISA, any

future claims for negligent administration (as defined in the Enron Fiduciary Liability Policies) and any other future claims covered by the Enron Fiduciary Liability Policies that may be added to the Amended Complaint) (collectively, the "ERISA Counts") will be reduced by an amount equal to the Class Settlement Amount, such that the total amount of Plaintiffs' potential recovery against all such Barred Persons shall be reduced by no more than the Class Settlement Amount, unless the Barred Persons are Insured Non-Settling Defendants (as defined in Section 2.5.4 below), in which case each such Insured Non-Settling Defendant will receive an additional credit as provided in Section 2.5.4;

2.5.4 Provide that any judgments entered under the ERISA Counts against any Barred Person who is (i) currently or subsequently named as a defendant in the *Tittle Action* and (ii) covered by the terms of the Enron Fiduciary Liability Policies (an "Insured Non-Settling Defendant"), will be further reduced by a credit of Ten Million Dollars ($10,000,000);

2.5.5 Provide that nothing in this Settlement Agreement or in the Bar Order shall in any manner limit any joint and several liability applicable to any Barred Person under ERISA as to the portion of any judgment remaining after application of the credits contemplated under this Section 2.5.3 and 2.5.4;

2.5.6 Provide that nothing in this Agreement or in the Bar Order is intended to negate or preclude, with respect to claims not released herein, rights or entitlements, if any, of the Settling Defendants to any settlement credit or judgment reduction (or similar offset or credit) based upon this Settlement or the payment of the Class Settlement Amount;

2.5.7 Permanently enjoin Named Plaintiffs, the Settlement Class and the Enron Plans from bringing any action in any forum relating to Plaintiffs' Released Claims that does not conform to the covenants of this Settlement Agreement;

2.5.8 Permanently enjoin the Defendant Releasees from bringing against the Barred Persons, either derivatively or on behalf of themselves, or through any Person purporting to act on their behalf or purporting to assert a claim under or through them, any Claim for indemnity, for contribution or any other claim arising out of or concerning any of the Barred Claims in any forum, action or proceeding of any kind (other than claims for indemnity against the Enron Corp. based on any indemnity provision in any Plan or Plan-related document), provided that a Defendant Releasee shall not be enjoined pursuant to this Section 2.5.8 from bringing a Claim against a Barred Person if for any reason such Barred Person asserts, or is legally not barred pursuant to Section 2.5.2 from bringing, a Claim against such Defendant Releasee; and

2.5.9 Provide that the Court shall retain exclusive jurisdiction to resolve any disputes or challenges that may arise as to the performance of this Settlement Agreement or any challenges as to the performance, validity, interpretation, administration or enforcement or enforceability of the Notice, the Bar Order or this Settlement Agreement or the termination of this Settlement Agreement.

2.6 Notice regarding Bar Order. After the Bar Order, if entered, has become Final, Class Counsel shall have posted the Bar Order on their web sites, or shall have provided notice thereof in such other form as the Court has required.

2.7 Finality of Bankruptcy Court Order Lifting Automatic Stay. The Bankruptcy Court shall have (a) entered an order granting relief from the automatic stay to permit payment

by the Underwriters of the Eighty-Five Million Dollar ($85,000,000) contribution payable by the Underwriters, as specified in Section 8.2 of this Agreement, from the Enron Fiduciary Liability Policies for the benefit of the Enron Plans, as contemplated hereunder, and such order shall have become Final, or (b) shall have entered an order indicating that such relief is not required, and such order shall have become Final.

2.8 Delivery of Releases On Behalf Of The Enron Plans. The Independent Fiduciary for the Enron Plans shall have delivered, and shall have caused the Enron Plan Trustees to deliver, to counsel for the Settling Defendants and to the Underwriters executed releases in form and substance acceptable to counsel for the Settling Defendants and counsel to the Underwriters (the "Plan Releases").

2.9 RESERVED.

2.10 Dismissals of Claims.

2.10.1 Dismissal of Action as to Administrative Committee Settling Defendants; No Actions Pending. The *Tittle Action* shall have been dismissed with prejudice as against the Administrative Committee Settling Defendants prior to the Effective Date referenced in Section 4.7. In addition, there shall be no other actions filed or pending against the Administrative Committee Releasees relating in any way to any of the events or transactions giving rise to the Administrative Committee Released Claims.

2.10.2 Dismissal of Certain Claims as to Officer and Director Settling Defendants. Counts I through VI in the *Tittle Action* shall have been dismissed with prejudice against the Officer and Director Settling Defendants prior to the Effective Date referenced in Section 4.7. There shall be no ERISA actions filed or pending against the Officer and Director Releasees relating in any way to any of the events or transactions giving rise to the Officer and Director Released Claims.

2.10.3 No Pending Claims as to Underwriter Settling Defendants. There shall be no actions filed or pending against the Underwriter Releasees with respect to the Enron Fiduciary Liability Policies identified herein relating in any way to the any of the events or transactions giving rise to the Underwriter Released Claims.

2.11 Funding of Class Settlement Amount; Resolution of Interpleader Action, If Any.

2.11.1 The Underwriters shall have deposited the contributions specified in Article 8.2 of this Agreement into the Settlement Trust, or, in the alternative, if the Underwriters have, or either of them has, filed a bill in the nature of an interpleader (as referenced in Section 8.6 below) (an "Interpleader Action") in lieu of contributing the funds to the Settlement Trust, either the Interpleader Court shall have entered an order allowing funding of the Class Settlement Amount in a manner that is consistent with the terms and requirements of this Settlement Agreement, and such Order shall have become Final, or the Settling Parties shall have exercised their discretion to amend this Settlement Agreement to reflect funding of the Class Settlement Amount in the manner ordered by the Court.

2.11.2 The Settling Defendant identified in Section 8.2.2 shall have contributed the one hundred thousand dollar ($100,000) contribution to the Settlement Trust as provided in Section 8.2.2.

3. STAY OF PROCEEDINGS

3.1 Stay as to Administrative Committee Settling Defendants. As soon as practicable, but in all events within ten (10) days after the Agreement Execution Date, the Settling Parties shall jointly move for a stay of all proceedings in the *Tittle Action* with respect to the Administrative Committee Settling Defendants.

3.2 Stay as to Officer and Director Settling Defendants. As soon as practicable, but in all events within ten (10) days after the Agreement Execution Date, the Settling Parties shall jointly move for a stay of all proceedings in the *Tittle Action* relating to Counts I through VI with respect to the Officer and Director Settling Defendants, as applicable.

3.3 Scope of Stays. The Settling Parties agree to incorporate in the motion papers seeking the stays contemplated under this Article a provision clarifying that the stays entered pursuant to Sections 3.1 and 3.2 shall not preclude Named Plaintiffs from participating in any discovery of the Settling Defendants.

3.4 Dissolution of Stay. Any stay entered pursuant to this Article 3 shall be dissolved upon the earlier to occur of the date on which (a) the Settlement shall have become Unconditional; or (b) this Settlement Agreement shall have been terminated pursuant to the provisions of Article 10.

4. RELEASES AND COVENANT NOT TO SUE

4.1 Defendant Releasees.

4.1.1 The Administrative Committee Releasees. The "Administrative Committee Releasees" are, collectively as set forth in Schedule 1.3:

(a) The Administrative Committees;

(b) The Administrative Committee Members; and

(c) Mikie Rath, Cynthia Barrow and all other Persons who, as members of the Enron Human Resources Department, provided administrative services to the Enron Plans.

4.1.2 The Officer and Director Releasees. The "Officer and Director Releasees" are: The Officer and Director Settling Defendants as identified in Schedule 1.29.

4.1.3 The Underwriter Releasees. The Underwriter Releasees are the Underwriters, as identified in Section 1.41, and their respective directors, officers, employees, reinsurers, Affiliates and counsel.

4.1.4 Collectively, the Administrative Committee Releasees, the Officer and Director Releasees and the Underwriter Releasees constitute the "Defendant Releasees." The phrases "Administrative Committee Releasees," "Officer and Director Releasees," "Underwriter Releasees" and "Defendant Releasees" include any and all beneficiaries, predecessors, successors, assignors, assigns, trusts, estates, receivers, conservators, guardians, spouses, children, parents and siblings, family trusts and children's trusts and their beneficiaries and trustees, and each of the respective Successors-in-Interest, predecessors, assigns, heirs, administrators, executors, and personal representatives of the foregoing, of each and every Person defined as Defendant Releasees.

4.2 Releases of the Defendant Releasees.

4.2.1 Release of the Administrative Committee Releasees:

(a) Effective at the time prescribed in Section 4.7, Named Plaintiffs, on behalf of themselves, on behalf of the Settlement Class and on behalf of the Enron Plans, absolutely and unconditionally release and forever discharge the Administrative Committee Releasees from all Administrative Committee Released Claims (as defined below) that Named Plaintiffs, the Settlement Class and the Enron Plans directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have.

(b) The "Administrative Committee Released Claims" shall include: any and all claims of any nature whatsoever, any and all losses, damages, attorneys' fees, disgorgement of fees, fines and penalties, and claims for contribution or indemnification, whether accrued or not, whether already acquired or acquired in the future, whether known or unknown, in law or equity, civil or criminal, seeking damages, attorneys' fees, litigation costs, injunctive, contractual, extra-contractual, declaratory or any other relief, or brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise (collectively, "Claims"), arising out of or in any way related to any or all of the acts, omissions, facts, matters, transactions, or occurrences:

(i) That are, were, or could have arisen out of or been related in any way directly or indirectly to (a) the Enron Plans; or (b) the Administrative Committee Releasees' service as members of, or provision of services to, any or all of the Administrative Committees or management and administration of the Enron Plans; or (c) the Administrative Committee Releasees' alleged violations of ERISA, alleged breach of their responsibilities as fiduciaries under ERISA or under any common or other statutory law to Named Plaintiffs, the Settlement Class or the Enron Plans or to any other Person in connection with the Enron Plans, and the Administrative Committee Releasees' alleged errors and omissions in the administration of the Enron Plans, including, without limitation, any and all actual or alleged breaches of duty, neglect, error, misstatement, misleading statement or omission allegedly caused, committed or attempted by any Administrative Committee Releasee in the administration of the Enron Plans; or

(ii) That are or were covered by the terms of the Enron Fiduciary Liability Policies; or

(iii) That are, were, or could have been directly or indirectly alleged, asserted or set forth in the *Tittle Action.*

4.2.2 Release of the Officer and Director Releasees.

(a) Effective at the time prescribed in Section 4.7, Named Plaintiffs, on behalf of themselves, on behalf of the Settlement Class and on behalf of the Enron Plans, absolutely and unconditionally release and forever discharge the Officer and Director Releasees from all Officer and Director Released Claims (as defined below) that Named Plaintiffs, the Settlement Class and the Enron Plans directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have.

(b) The "Officer and Director Released Claims" are any and all Claims:

(i) that are, were, or could have arisen out of or been related in any way directly or indirectly to any actual or alleged violation of any responsibility, obligation or duty imposed upon the Officer and Director Releasees by ERISA or by the common or statutory law of the United States or any State or other jurisdiction actually or allegedly caused, committed or attempted by any Officer and Director Releasees in their capacity as fiduciaries of the Enron Plans, or any actual or alleged errors and omissions in the administration of the Enron Plans, including, without limitation, any and all actual or alleged breaches of duty, neglect, error, misstatement, misleading statement or omission allegedly caused, committed or attempted by any Officer and Director Releasee in the administration of the Enron Plans; or

(ii) that are or were covered by the terms of the Enron Fiduciary Liability Policies, subject to the limitation set forth in Section 4.2.2(b)(iii);

(iii) provided, however, that the Officer and Director Released Claims expressly are limited to those claims set forth above in Section 4.2.2(b)(i-ii), and the release of those Claims shall not bar, waive, or release the RICO, state and common law claims set forth in Counts VI through IX of the First Amended Complaint in the *Tittle Action* filed on or about April 8, 2002. This Settlement Agreement does not preclude amendment of those Counts VI through IX to cure any pleading defects in response to any ruling on a motion to dismiss or as otherwise ordered or permitted by the Court, nor does it preclude other causes of action not described in Sections 4.2.2 (b)(i–ii) above; however, nothing in this sentence is intended to permit, revive or preserve any Claim described in Sections 4.2.2 (b)(i–ii) above.

4.2.3 Release of the Underwriter Releasees.

(a) Effective at the time prescribed in Section 4.7, Named Plaintiffs, on behalf of themselves, on behalf of the Settlement Class and on behalf of the Enron Plans, absolutely and unconditionally release and forever discharge the Underwriter Releasees from all Underwriter Released Claims (as defined below) that Named Plaintiffs, the Settlement Class and the Enron Plans directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have.

(b) The "Underwriter Released Claims" are any and all Claims that are, were, or could have arisen out of or been related in any way to the Administrative Committee Released Claims, the Officer and Director Released Claims and/or the Enron Fiduciary Liability Policies; however, nothing herein waives or releases any claims against the Underwriters or any other insurance carriers pertaining to coverage under the fidelity bonds that provide coverage to the Plans for certain losses to the Plans, including the following policies: St. Paul Crime Loss Indemnity Policy, Policy No. 400 JW 6221; Federal Insurance Policy, Policy No. 8109-28-95G; Great American Insurance Company, Policy No. CRP 268-75-60, and any other fidelity bonds that may provide coverage to the Plans.

4.3 Settling Defendants' Releases of Named Plaintiffs, the Settlement Class and Class Counsel.

4.3.1 Effective at the time prescribed in Section 4.7, the Settling Defendants absolutely and unconditionally release and forever discharge the Named Plaintiffs and the

Settlement Class (collectively, the "Plaintiff Releasees") from any and all Claims relating to the institution or prosecution or the settlement of any claims released pursuant to this Settlement Agreement (the "Defendants' Released Claims"), as well as any and all Claims for contribution, for indemnification, or any other Claims relating to payment of the Class Settlement Amount by the Settling Defendants.

4.3.2 The Plaintiff Releasees include any and all of the current and former: officers and directors, counsel, accountants, insurers, sureties, employees, beneficiaries, predecessors, successors, assignors, assigns, divisions and merged or acquired companies and operations, owners, managers, members, partners, partnerships, sole proprietorships, trusts, estates, receivers, conservators, guardians, spouses, children, parents and siblings, family trusts and children's trusts and their beneficiaries and trustees, and each of the respective Successors-in-Interest, predecessors, assigns, heirs, administrators, executors, and personal representatives of the foregoing, of each and every Person defined as Plaintiff Releasees in Section 4.3.1.

4.4 Reciprocal Releases among Administrative Committee Releasees and Officer and Director Releasees. Effective at the time prescribed in Section 4.7, the Persons who are Administrative Committee Settling Defendants and the Persons who are Officer and Director Settling Defendants absolutely and unconditionally release and forever discharge each and every other Person who is an Administrative Committee Settling Defendant or an Officer and Director Settling Defendant from any and all Claims relating to the Administrative Committee Released Claims and the Officer and Director Released Claims, including, without limitation, any and all Claims for contribution, or indemnification for such Claims. Such releases shall have no impact in any manner on any claims or any right to recovery Plaintiffs have or may have against the Officer and Director Releasees under Counts VI –IX of the First Amended Complaint in the *Tittle* Action.

4.5 Scope of Releases; Release of Unknown ERISA Claims.

4.5.1 The releases set forth in Sections 4.2, 4.3 and 4.4 (collectively, the "Releases") are intended to be as broad and comprehensive as possible, and are intended to include the release of unknown and unsuspected claims, as well as of any claim or right obtained by assignment. The Releases are not intended to include the release of any rights or duties arising out of this Settlement Agreement, including, but not limited to, the express warranties and covenants set forth in this Settlement Agreement.

4.5.2 The Settling Parties intend and agree that the Releases granted in this Article 4 shall be effective as a bar to any and all currently unsuspected, unknown or partially known claims within the scope of their express terms and provisions. Accordingly, Named Plaintiffs hereby expressly waive, on their own behalf, on behalf of all members of the Settlement Class, and on behalf of the Enron Plans, and the Settling Defendants hereby expressly waive on their own behalf, any and all rights and benefits respectively conferred upon them by the provisions of Section 1542 of the California Civil Code and all similar provisions of the statutory or common laws of any other State, Territory or other jurisdiction. Section 1542 reads in pertinent part:

> "A general release does not extend to claims that the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Named Plaintiffs and Settling Defendants each hereby acknowledge that the foregoing waiver of the provisions of Section 1542 of the California Civil Code and all similar provisions of the statutory or common laws of any other State, Territory or other jurisdiction was separately bargained for and that neither Named Plaintiffs, on the one hand, nor Settling Defendants on the other, would enter into this Settlement Agreement unless it included a broad release of all unknown claims. Named Plaintiffs and Settling Defendants each expressly agree that all release provisions in this Settlement Agreement shall be given full force and effect in accordance with each and all of their express terms and provisions, including those terms and provisions relating to unknown, unsuspected or future claims, demands and causes of action. Named Plaintiffs assume for themselves on their own behalf, on behalf of the Settlement Class and the Enron Plans, and Settling Defendants assume for themselves on their own behalf, the risk of his, her or its respective subsequent discovery or understanding of any matter, fact or law, that if now known or understood, would in any respect have affected his, her or its entering into this Settlement Agreement.

4.6 Persons and Claims Not Released.

4.6.1 Nothing in this Settlement Agreement releases or shall be deemed to release any Person or Claims other than as set forth in the express terms and provisions of this Settlement Agreement. The Defendant Releasees expressly do not include, and this Settlement Agreement does not in any way bar, limit, waive, or release, any Claims against the Non-Settling Defendants, including but not limited to, Enron, the Northern Trust Company, or any of its subsidiaries or affiliates, Kenneth Lay, Jeffrey Skilling, Andrew Fastow, or Michael Kopper. Nor does this Settlement Agreement in any way bar, limit, waive or release any Claims against any Defendant Releasees that are outside the scope of the respective Releases. Nor does this Settlement Agreement in any way bar, limit, waive or release any claims, demands or rights against (or entitlement to coverage from) any insurer or Underwriter for losses to the Plans under the fidelity bond policies that may apply to and protect against such losses.

4.6.2 Nothing in this Settlement Agreement shall release, bar, waive, or otherwise affect any Claim that has been or could be asserted under the state or federal securities laws by the Enron Plans, the Enron Plans' Trustees, or any individual member of the Settlement Class directly or derivatively in the *Newby* Action. The Releases of Claims set forth in this Settlement Agreement shall have no impact whatsoever on any damages that are or could be sought or recovered in the *Newby* Action, and under no circumstances shall the Class Settlement Amount, or any payment to the Enron Plans or any class member, be applied as a set-off or credit against any judgment, recovery, or settlement obtained in the *Newby* Action, provided, however, that this Section 4.6.2 shall not be construed to permit any member of the Settlement Class to recover more than one hundred percent of his or her losses under the Enron Plans.

4.7 Effective Date of Releases.

4.7.1 The Releases provided in Section 4 shall become effective upon the disbursement of the Class Settlement Amount to the Enron Plans pursuant to the provisions in this Settlement Agreement and the Trust Agreement as provided for in Section 9.1 of this Settlement Agreement, provided, however, that no release under the terms of this Settlement Agreement of any Person not a party to this Agreement shall extend to, or become effective as to, such Person unless such Person provides to the releasing Person a reciprocal release and covenant not to sue that is consistent with the terms of the release and covenant not to sue set

forth in Section 4 above. The Releases provided in Section 4, and the Dismissals in Section 2, are expressly in exchange for, among other covenants and promises set forth in the Agreement, the payment by the Settling Defendants of the Class Settlement Amount pursuant to the terms and conditions of Section 8.2.

4.8 Covenants Not to Sue.

4.8.1 Named Plaintiffs covenant and agree on their own behalf, on behalf of the Settlement Class and on behalf of the Enron Plans:

(a) Not to file against any Defendant Releasee or Underwriter Releasee any action or proceedings based on or arising from any Claim released as to that Defendant Releasee or Underwriter Releasee under this Settlement Agreement;

(b) That the foregoing covenants and agreements shall be a complete defense to any such civil action or proceeding against any of the respective Defendant Releasees or Underwriter Releasees.

4.8.2 The Settling Defendants covenant and agree not to file any action or proceedings against the Plaintiff Releasees based on or arising from Defendants' Released Claims. The Settling Defendants further agree that such covenants and agreements shall be a complete defense to any such civil action or proceeding against any of the respective Plaintiff Releasees.

4.8.3 The Administrative Committee Releasees, and each of them, and the Officer and Director Releasees, and each of them, covenant and agree not to file any action or proceedings against any other Administrative Committee Releasee or any other Officer and Director Releasee based on the Administrative Committee Released Claims or the Officer and Director Released Claims. The Administrative Committee Releasees and Officer and Director Releasees further agree that such covenants and agreements shall be a complete defense to any such civil action or proceeding against any of such Person.

5. COVENANTS

Named Plaintiffs hereby covenant on their own behalf and on behalf of the members of the Settlement Class as follows:

5.1 Taxation of Class Settlement Amount. Named Plaintiffs acknowledge that the Defendant Releasees have no responsibility for any taxes due on funds that the Enron Plans or Named Plaintiffs receive from the Class Settlement Amount.

5.2 Cooperation.

5.2.1 Upon request by Named Plaintiffs, the Administrative Committee Settling Defendants shall promptly make reasonably available to Named Plaintiffs for copying or inspection any documents or other information in their possession that may be relevant to the claims of the Named Plaintiffs against any of the Non-Settling Defendants other than information protected by the attorney-client or attorney work product privileges pertaining to the Administrative Committee Defendant Releasees. In addition, each Settling Defendant shall provide Named Plaintiffs with a copy of any deposition transcript(s) for any deposition(s) taken of him or her by the Department of Labor, or any other federal agency in connection with any investigation(s) pertaining to compliance with ERISA, or breach of fiduciary duty under ERISA,

or in the event such persons do not have a copy of such transcripts, such persons hereby authorize the agency that conducted the deposition to provide a copy of the transcript(s) of his or her deposition to Named Plaintiffs. Nothing in this Agreement shall bar, waive, or in any manner limit Named Plaintiffs' ability to obtain discovery from any Settling Defendant or Non-Settling Defendant in the *Tittle Action* in the manner and to the extent allowed by the Federal Rules of Civil Procedure.

5.2.2 If one or both Underwriters or any other party files an Interpleader Action under 28 U.S.C. § 1335 or other applicable statute or provision, or any other action for the purpose of staying, barring, altering or in any way preventing the Settlement Agreement from becoming Unconditional, the Settling Parties shall cooperate to enforce this Settlement Agreement and obtain the benefits hereof. Such cooperation shall include seeking to remove any such action to the United States District Court and seeking consolidation of such action into the *Tittle* litigation before Judge Harmon.

6. REPRESENTATIONS AND WARRANTIES

6.1 Named Plaintiffs' Representations and Warranties. Named Plaintiffs represent and warrant on their own behalf and on behalf of the Settlement Class:

6.1.1 That they individually and collectively have not assigned or otherwise transferred any interest in any Released Plaintiffs' Claim against any Released Defendant Party, and further covenant that they will not assign or otherwise transfer any interest in any Released Plaintiffs' Claim, other than to one or more other Named Plaintiffs who are bound by this Settlement Agreement;

6.1.2 That the releases given in Article 4 above will bind the Named Plaintiffs, the Enron Plans and the members of the Settlement Class, and that such Persons shall have no surviving claim or cause of action against any of the Defendant Releasees with respect to the respective Plaintiffs' Released Claims against them; and

6.1.3 That the Plans' Administrator has the information necessary to identify (or in good faith attempt to identify) all of the members of the Settlement Class and their last known mailing addresses, and Named Plaintiffs covenant to seek a Court order directing the Plans' Administrator to make such a good faith attempt to identify all members of the Settlement Class.

6.2 Settling Defendants' Representations and Warranties. Settling Defendants represent and warrant on their own behalf:

6.2.1 That they individually and collectively have not assigned or otherwise transferred any interest in any Released Defendants' Claim against Named Plaintiffs, the Settlement Class or Class Counsel, and further covenant that they will not assign or otherwise transfer any interest in any Released Defendants' Claim against any such party; and

6.2.2 That the releases given in Article 4 above will bind the Settling Defendants, and that such Persons shall have no surviving claim or cause of action against Named Plaintiffs, the Settlement Class or Class Counsel with respect to Defendants' Released Claims.

6.2.3 Nothing in this Agreement shall preclude any Settling or Non-settling Defendant from assigning to Named Plaintiffs any interest in any indemnity or contribution claim against the Enron Corp.

6.3 Settling Parties' Representations and Warranties. The Settling Parties, and each of them, represent and warrant:

6.3.1 That they are voluntarily entering into this Settlement Agreement as a result of arm's-length negotiations among their counsel, that in executing this Settlement Agreement they are relying solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the nature, extent and duration of their rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof, and that, except as provided herein, they have not been influenced to any extent whatsoever in executing this Settlement Agreement by any representations, statements or omissions pertaining to any of the foregoing matters by any party or by any person representing any party to this Settlement Agreement. Each Settling Party assumes the risk of mistake as to facts or law; and

6.3.2 That they have carefully read the contents of this Settlement Agreement, and this Settlement Agreement is signed freely by each Person executing this Settlement Agreement on behalf of each of the Settling Parties. The Settling Parties, and each of them, further represent and warrant to each other that he, she or it has made such investigation of the facts pertaining to the settlement, this Settlement Agreement and all of the matters pertaining thereto, as he, she or it deems necessary.

6.4 Signatories' Representations and Warranties. Each individual executing this Settlement Agreement on behalf of any other Person does hereby personally represent and warrant to the other Settling Parties that he or she has the authority to execute this Settlement Agreement on behalf of, and fully bind, each principal which such individual represents or purports to represent.

7. NO ADMISSION OF LIABILITY

The Settling Parties understand and agree that this Settlement Agreement embodies a compromise settlement of disputed claims, and that nothing in this Settlement Agreement, including the furnishing of consideration for this Settlement Agreement, shall be deemed to constitute any finding of wrongdoing by any of the Settling Defendants, or give rise to any inference of wrongdoing or admission of wrongdoing or liability in this or any other proceeding. This Settlement Agreement and the payments made hereunder are made in compromise of disputed claims and are not admissions of any liability of any kind. Moreover, the Settling Defendants specifically deny any such liability or wrongdoing.

8. THE SETTLEMENT TRUST; DELIVERIES INTO THE SETTLEMENT TRUST

8.1 The Settlement Trust.

8.1.1 Within ten (10) days after preliminary approval by the Court as contemplated under Section 2.3.1 above, the Settling Parties shall establish a settlement trust, which shall be considered a common fund created as a result of the *Tittle Action,* pursuant to a

trust agreement in form and substance mutually acceptable to counsel for the Settling Parties (the "Settlement Trust").

8.1.2 The Settling Parties shall jointly select the trustee for the Settlement Trust, subject to Court approval.

8.1.3 The Settlement Trust shall bear interest for the benefit of the Settlement Class, shall be structured and managed to qualify as a Qualified Settlement Fund under Section 468B of the Internal Revenue Code and Treasury regulations promulgated thereunder and shall contain customary provisions for such trusts, including obligations of the Settlement Trust to make tax filings and to provide reports to Settling Parties for tax purposes. The Settling Parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment. The Settling Parties agree that the Settlement Trust will pay any federal, state and local taxes that may apply to the income of the Qualified Settlement Fund. Class Counsel shall arrange for the preparation and filing of all tax reports and tax returns required to be filed by the Qualified Settlement Fund and for the payment from the Qualified Settlement Fund of any taxes owed. Class Counsel shall be authorized to retain a certified public accounting firm for those purposes. All taxes on the income of the Qualified Settlement Fund and tax-related expenses incurred in connection with the taxation of the Qualified Settlement Fund shall be paid out of the Qualified Settlement Fund, shall be considered a cost of administration of the Settlement, and shall be timely paid without further order of the Court. Class Counsel shall arrange for the preparation and issuance of any required Forms 1099 to Named Plaintiffs and Settlement Class members receiving payments from the Qualified Settlement Fund, and costs incurred in connection therewith also shall be paid out of the Qualified Settlement Fund, and shall be considered a cost of administration of the Settlement, and shall be timely paid by the Trust without further order of the Court.

8.1.4 The Settling Parties agree to structure the Settlement Trust to the extent possible to preserve for the Settlement Class the tax benefits associated with retirement plans. The Named Plaintiffs further agree that, if necessary to accomplish this goal, the portion of the Qualified Settlement Fund determined under the Plan of Allocation for distribution to the Settlement Class may be transferred to the Plans' Independent Fiduciary for distribution to current and former Plan participants directly from the Plans. The Class Notice shall inform the Settlement Class Members that in order to preserve the tax-protected status of any payments they receive, they must roll the payments over into their current qualified retirement plan, or into another appropriate tax-protected retirement vehicle, such as an IRA.

8.2 The Class Settlement Amount.

8.2.1 In consideration of, and expressly in exchange for, all of the promises and agreements set forth in this Settlement Agreement, and of the stipulated dismissals contemplated under this Settlement Agreement, as described in Section 8.5 below, the Settling Defendants will make a formal written demand upon the Underwriters to deliver, subject to any necessary approvals of the Bankruptcy Court or Interpleader Court (as defined below), and in accordance with delivery instructions provided by the Trustee, the following amounts (collectively, the "Underwriter Class Settlement Amount") into the Settlement Trust for the benefit of the Enron Plans within seven (7) days after the establishment of the Settlement Trust:

Underwriter	Amount
AEGIS:	$35,000,000
FIC	$50,000,000

8.2.2 As further consideration of the promises and agreements set forth in this Settlement Agreement, and of the stipulated dismissals contemplated under this Settlement Agreement, within seven (7) days after establishment of the Settlement Trust, Defendant Cindy Olson shall contribute the sum of one hundred thousand dollars ($100,000), in a form acceptable to Class Counsel, to the Settlement Trust.

8.2.3 The Eighty-Five Million One Hundred Thousand Dollars ($85,100,000) deposited in the Settlement Trust pursuant to Section 8.2.1 and 8.2.2 above, and all net income earned thereon, shall constitute the "Class Settlement Amount."

8.2.4 The Settling Parties acknowledge and agree that Settling Defendants shall have no authority or liability in connection with the management, investment, maintenance or control of the Settlement Trust.

8.3 Sole Monetary Contribution. The Class Settlement Amount shall constitute a non-recourse settlement amount, and shall be the full and sole monetary contribution made by or on behalf of the Settling Defendants in connection with the Settlement effected between Named Plaintiffs and the Settling Defendants under this Settlement Agreement. For the avoidance of doubt, in no circumstance shall the Settling Defendants, or any of them, have any personal obligation to fund any or all of the Underwriter Class Settlement Amount. The Class Settlement Amount specifically covers any claims for costs and attorneys' fees by Named Plaintiffs as well as any costs or expenses of the class action notice. Except as set forth in Section 9.2 below or as otherwise specified in this Agreement, the Settling Parties shall bear their own costs and expenses (including attorneys' fees) in connection with effectuating the Settlement and securing all necessary court orders and approvals with respect to/ same.

8.4 Acknowledgements regarding Class Settlement Amount. The Settling Defendants agree and acknowledge that, assuming that the Settlement contemplated hereunder becomes Unconditional, the Class Settlement Amount must be paid regardless of whether any court or jury ultimately determines that the fault, if any, of the respective Settling Defendants is less in proportion to the Settling Parties' damages than the Class Settlement Amount. Named Plaintiffs agree and acknowledge on their own behalf, on behalf of the members of the Settlement Class and on behalf of the Enron Plans that they have no right to seek additional sums from the Defendant Releasees based on the Released Claims, regardless of whether any court or jury ultimately determines that the fault, if any, of the Defendant Releasees is greater in proportion to the damages of Named Plaintiffs than the Class Settlement Amount.

8.5 Releases; Stipulated Dismissals.

8.5.1 Within seven (7) days after the establishment of the Settlement Trust, Named Plaintiffs shall place in escrow with Trustee the Releases, as specified in Section 2.8 above, along with stipulated dismissals of the *Tittle Action,* or stipulated dismissals of specific counts thereof, as the case may be (as provided in Section 8.5.2 below), against the Settling Defendants. The Trust Agreement will provide that Trustee will accept and hold such Releases and stipulated dismissals in escrow and deliver them to the respective representatives of the

Settling Defendants concurrently with disbursement of the Class Settlement Amount to the Enron Plans.

8.5.2 The stipulated dismissal against the Administrative Committee Settling Defendants shall dismiss the *Tittle Action* with prejudice as to the Administrative Committee Settling Defendants. The stipulated dismissal against the Officer and Director Settling Defendants shall dismiss Counts I-VI of the *Tittle Action* with prejudice as to the Officer and Director Settling Defendants named as defendants in such Counts, but shall have no impact on the remaining Counts of the *Tittle Action*.

8.6 Possible Bill in the Nature of Interpleader.

8.6.1 The Settling Parties acknowledge that:

(a) The Eighty-Five Million Dollar Underwriter Class Settlement Amount constitutes the entire aggregate Limits of Liability under the two Enron Fiduciary Liability Policies ("Policy Limits") (exclusive of Defense Costs otherwise payable under the separate sub-limit of the AEGIS Policy);

(b) The Underwriters' contribution of the Underwriter Class Settlement Amount toward the Settlement will fully exhaust the Policy Limits with respect to any coverage for settlement amounts or judgments under the Enron Fiduciary Liability Policies (exclusive of Defense Costs otherwise payable under the Policies);

(c) The Underwriters have reserved the right to commence an Interpleader Action to resolve any dispute that may arise among their insureds about the appropriate use of the Policy Limits;

8.6.2 If the Underwriters elect (or either of them elects) to initiate an Interpleader Action, and if they deposit the Underwriter Class Settlement Amount under the control of the court in which the Interpleader Action is commenced (the "Interpleader Court"), (or post a bond in lieu of such a deposit), rather than depositing the Underwriter Class Settlement Amount into the Settlement Trust, the Settling Parties acknowledge and agree as follows:

(a) If the Underwriters deposit the Underwriter Class Settlement Amount with the Interpleader Court, all interest earned thereon from and after the date of such deposit shall be added to and become part of the Underwriter Class Settlement Amount. If the Underwriters post bond payable to the clerk of the court in lieu of making such a deposit, interest shall be deemed to accrue on the Underwriter Class Settlement Amount for the benefit of the Settlement Class from and after the date that the bond is posted, which interest shall be at a rate required or allowed by the Interpleader Court;

(b) If the Interpleader Court approves the use of the Policy Limits as contemplated in this Settlement Agreement, the Settling Parties agree that the Underwriter Class Settlement Amount will be deposited in the Settlement Trust for subsequent disbursal to the Enron Plans as contemplated under Section 9.1 of this Settlement Agreement.

(c) If the Interpleader Court does not approve the use of the Policy Limits as contemplated in this Settlement Agreement, and if the Settling Parties thereafter do not agree within thirty-one (31) days to amend this Settlement Agreement to adjust the Underwriter Class Settlement Amount in a manner consistent with the Interpleader Court's findings, if any, as

to the specific allocation of the Policy Limits, this Settlement Agreement shall terminate as provided in Section 10.1.5 below. Because in such event there will be no settlement to fund pursuant to this Settlement Agreement, the Settling Parties understand that the Underwriters may seek to reassert an interest in the Policy Limits and reversion to the Underwriters of any funds deposited with the Interpleader Court (and interest earned thereon), subject to Section 9.2.2 below, the Settling Parties will support the Underwriters' application to that effect, or to the release of any bond that the Underwriters may have posted upon initiation of the Interpleader Action.

9. EFFECTIVE DATE OF SETTLEMENT; RELEASE OF THE CLASS SETTLEMENT AMOUNT

9.1 Establishment of Effective Date of Settlement. The Settling Parties shall determine and establish the Effective Date of Settlement as follows:

9.1.1 Class Counsel shall notify counsel for Settling Defendants in writing when Class Counsel believe that each and every condition in Article 2 has been satisfied or waived and that the Enron Plans are entitled to receive a disbursement of the Class Settlement Amount from the Settlement Trust. Within seven (7) days after receipt of such notice, the Settling Defendants shall either agree in writing that all conditions to settlement set forth in Article 2 have been satisfied or waived, in which case the Class Settlement Amount may be disbursed to the Enron Plans, or shall disagree in writing that all such conditions have been satisfied or waived, in which case the provisions of Section 9.1.3 below shall apply.

9.1.2 If, and only if, the Settling Defendants agree in writing within the foregoing seven-day period that all conditions set forth in Article 2 have been satisfied or waived, Class Counsel and counsel for the Settling Defendants shall jointly direct the Trustee by written notice to distribute the Class Settlement Amount to the Enron Plans in the manner required by the Plan of Allocation approved by the Court within seven (7) days after receipt of such notice.

9.1.3 If Named Plaintiffs and the Settling Defendants disagree as to whether each and every condition set forth in Article 2 has been satisfied or waived, they shall promptly confer in good faith and, if unable to resolve their differences within fourteen (14) days after the end of the seven-day period specified in Section 9.1.1, shall present their disputes for determination to the Court, which shall retain jurisdiction for this purpose. No portion of the Class Settlement Amount shall be distributed in the event of such a dispute pending the Court's ruling, but the Settling Parties agree that the Court's ruling shall be deemed final and binding, and hereby waive any right to appeal that ruling. Disbursement shall thereafter be made by the Trustee pursuant to the Court's order.

9.2 Disbursement from Settlement Trust for Payment of Class Notice and Bar Order Notice.

9.2.1 Except as provided in Section 9.2.2 or in Article 10 below, no distribution of any part, or all, of the Class Settlement Amount shall be made from the Settlement Trust until the Trustee has received (a) a joint notice signed by Class Counsel and by counsel for the Settling Defendants, or (b) a Court Order directing that the Class Settlement Amount be disbursed and designating the appropriate recipient.

9.2.2 Within ten (10) days after the Underwriters fund the Settlement Trust pursuant to Section 8.2.1 above, Class Counsel and counsel for the Settling Defendants shall direct the Trustee in writing promptly to disburse from the Settlement Trust an amount approved by the Court for the payment of reasonable costs of the notice contemplated under Section 2.3.2 above. The Parties understand that if the Underwriters file an Interpleader Action instead of funding the Settlement Trust, AEGIS will not object to the payment of such costs of notice from any amount that it has placed in the Registry of the Interpleader Court, provided that the Interpleader Court approves such payment from the funds in the Registry of the Interpleader Court. If the Settlement Agreement is terminated or the Settlement does not become Unconditional for any other reason, no Person shall have an obligation to reimburse the costs of notice to the Settlement Trust or to the Registry of the Interpleader Court.

9.3 Plan of Distribution of Class Settlement Amount. The distribution of the Class Settlement Amount to the Plans shall be subject to a plan of allocation to be proposed by Class Counsel and approved by the Court. Settling Defendants will take no position with respect to such proposed plan of distribution, or such plan as may be approved by the Court. The plan of distribution is a matter separate and apart from the Settlement between the Parties, and no decision by the Court concerning the plan of distribution shall affect the validity of the Settlement Agreement or finality of the proposed Settlement in any manner.

10. TERMINATION OF THE SETTLEMENT AGREEMENT

10.1 Termination. This Settlement Agreement may automatically terminate or be terminated by the Settling Parties, and thereupon become null and void, in the following circumstances:

10.1.1 If the Court declines to approve the Class Action Settlement in the *Tittle Action*, or if the Court declines to approve the Bar Order, and if such order declining approval has become Final, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the date that any such Order becomes Final.

10.1.2 If the Court issues an order in the *Tittle Action* modifying the Settlement Agreement, and if within thirty-one (31) days after the date of any such ruling the Settling Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Court or by the Settling Parties, then, provided that no appeal is then pending from such ruling, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first day after issuance of the order referenced in this Section 10.1.2.

10.1.3 If the Fifth Circuit reverses the Court's Order approving the Class Action Settlement or reverses the Bar Order, and if within thirty-one (31) days after the date of any such ruling the Settling Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Court or by the Settling Parties, then, provided that no appeal is then pending from such ruling, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first day after issuance of the order referenced in this Section 10.1.3.

10.1.4 If the Supreme Court of the United States reverses a Fifth Circuit order approving the Class Action Settlement or approving the Bar Order, and if within thirty-one (31) days after the date of any such ruling the Settling Parties have not agreed in writing to proceed

with all or part of the Settlement Agreement as modified by the Court or by the Settling Parties, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first day after issuance of the order referenced in this Section 10.1.4.

10.1.5 If (a) the Underwriters, individually or together, file an Interpleader Action instead of funding the Settlement Trust as set forth above, and (b) the Interpleader Court enters an order requiring funding of the Class Settlement Amount that is inconsistent with the terms of this Agreement, and (c) such Order has become Final, and (d) the Settling Parties have not agreed in writing to proceed with this Settlement, this Settlement Agreement shall be terminated and become null and void on the thirty-first day after the date that any such Order becomes Final.

10.1.6 If an appeal is pending of (a) an order declining to approve the Settlement Agreement, or the Bar Order, or modifying this Settlement Agreement, or (b) an order of the Interpleader Court, this Settlement Agreement shall not be terminated until final resolution or dismissal of any such appeal, except by written agreement of the Settling Parties.

10.1.7 If any and all issues between the U.S. Department of Labor and the Settling Defendants, including, but not limited to, the pending suit captioned Chao v. Enron Corporation, et al., Civil No. H 03 - CV-2257, which was consolidated into Civil No. H 01- CV-3913 before United States District Court for the Southern District of Texas (Houston Division), have not been resolved on terms acceptable to counsel for the Settling Defendants in their sole discretion on or before the fifteenth day before the date of the hearing with respect to final approval of the Settlement ("Final Approval Hearing"), the respective Settling Defendants shall have the right in their sole discretion to terminate the Settlement Agreement by written notice from counsel delivered to counsel for Named Plaintiffs at any time up until the fifteenth day before the Final Approval Hearing, and if any Settling Defendant timely gives such notice, this Settlement Agreement shall become null and void as to all Settling Parties on the tenth day after the date of delivery of any such notice.

10.2 Consequences of Termination of the Settlement Agreement. If the Settlement Agreement is terminated and rendered null and void for any reason specified in Section 10.1 above, the following shall occur:

10.2.1 The Settling Parties shall within ten (10) days after the date of termination of the Settlement Agreement jointly move to lift the stay contemplated in Article 3 above; and

10.2.2 Class Counsel and counsel for the Settling Defendants shall within ten (10) days after the date of termination of the Settlement Agreement jointly notify the Trustee in writing to return to the Underwriters and any other Settling Defendant who contributed to the Settlement Trust the respective amounts, if any, contributed by such Persons, with all net income earned thereon, after deduction on a pro rata basis of the amount earlier disbursed for the Class Notice and the Bar Order Notice, directing the Trustee to effect such return within fourteen (14) days after receipt of the joint notice.

10.2.3 The *Tittle Action* shall for all purposes with respect to the Settling Parties revert to its status as of the day immediately before the Execution Date.

10.2.4 All Releases and dismissals delivered to the Settlement Trust pursuant to the Settlement Agreement shall be null and void; none of the terms of the Settlement

Agreement shall be effective or enforceable, except those provisions providing for reimbursement of costs as set forth in Section 9.2.2; neither the fact nor the terms of the Settlement Agreement shall be offered or received in evidence in this action or in any other action or proceeding for any purpose, except in an action or proceeding arising under this Settlement Agreement.

11. ATTORNEYS' FEES AND EXPENSES

11.1 Application for Attorneys' Fees and Expenses. As provided in Section 2.3.3 above, and pursuant to the common fund doctrine, Class Counsel may apply to the Court at the Fairness Hearing for an award of attorneys' fees, and for reimbursement of expenses, to be paid from the Class Settlement Amount. Settling Defendants, their counsel and their agents and assigns expressly agree not to contest or take any position with respect to any application for attorneys' fees and expenses made by Class Counsel with respect to this Settlement.

11.2 Disbursement of Attorneys' Fees and Expenses. Attorneys' fees and expenses awarded by the Court shall be paid from the Class Settlement Amount to Class Counsel within seven (7) days after the Settlement has become Unconditional.

12. MISCELLANEOUS PROVISIONS

12.1 Jurisdiction. The Court shall retain jurisdiction over all Settling Parties to resolve any dispute that may arise regarding this Settlement Agreement or the Order and Notice referenced in Section 2 above, including any dispute regarding validity, performance, interpretation, administration, enforcement, enforceability, or termination of the Settlement Agreement.

12.2 Governing Law. This Settlement Agreement shall be governed by the laws of the State of Texas without giving effect to the conflict of laws or choice of law provisions thereof, except to the extent that the law of the United States governs any matter set forth herein, in which case such federal law shall govern.

12.3 Severability. The provisions of this Settlement Agreement are not severable.

12.4 Amendment. Before entry of a Final Order approving the Settlement Agreement, the Settlement Agreement may be modified or amended only by written agreement signed by or on behalf of all parties hereto. Following entry of a Final Order approving the Settlement Agreement, the Settlement Agreement may be modified or amended only by written agreement signed on behalf of all the parties, and approved by the Court.

12.5 Waiver. The provisions of this Settlement Agreement may be waived only by an instrument in writing executed by the waiving party. The waiver by any party of any breach of this Settlement Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.

12.6 Construction. None of the Settling Parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

12.7 Principles of Interpretation. The following principles of interpretation apply to this Settlement Agreement:

12.7.1 Headings. The headings of this Settlement Agreement are for reference purposes only and do not affect in any way the meaning or interpretation of this Settlement Agreement.

12.7.2 Singular and Plural. Definitions apply to the singular and plural forms of each term defined.

12.7.3 Gender. Definitions apply to the masculine, feminine, and neuter genders of each term defined.

12.7.4 References to a Person. References to a Person are also to the Person's permitted successors and assigns.

12.7.5 Terms of Inclusion. Whenever the words "include," "includes" or "including" are used in this Settlement Agreement, they shall not be limiting but rather shall be deemed to be followed by the words "without limitation."

12.8 Further Assurances. Each of the Settling Parties agrees, without further consideration, and as part of finalizing the Settlement hereunder, that they will in good faith execute and deliver such other documents and take such other actions as may be necessary to consummate and effectuate the subject matter and purpose of this Settlement Agreement.

12.9 Survival. All representations, warranties and covenants set forth in this Settlement Agreement shall be deemed continuing and shall survive the Effective Date of Settlement, or termination or expiration of this Settlement Agreement.

12.10 Notices. Any notice, demand or other communication under this Settlement Agreement (other than notices to Class Members) shall be in writing and shall be deemed duly given upon receipt if it is addressed to each of the intended recipient as set forth below and personally delivered, sent by registered or certified mail (postage prepaid), sent by confirmed facsimile, or delivered by reputable express overnight courier:

IF TO NAMED PLAINTIFFS:

Lynn Lincoln Sarko, Esq.
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Fax: (206) 623-3384

Steve W. Berman, Esq.
HAGENS BERMAN, LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
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Fax:(206) 623-0594

IF TO SETTLING DEFENDANTS:

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Counsel to the Appendix "C" Defendants

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1299 Pennsylvania Ave., NW
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Fax: 202.383.6610
Counsel to the Appendix "C" Defendants and
Paulo Ferraz Pereira

Any Settling Party may change the address at which it is to receive notice by written notice delivered to the other Settling Parties in the manner described above.

12.11 Entire Agreement. This Settlement Agreement contains the entire agreement among the Settling Parties relating to this Settlement. It specifically supersedes any settlement terms or settlement agreements between or among the Settling Parties that were previously agreed upon orally or in writing, or executed, by or among any of the Settling Parties.

12.12 Counterparts. This Settlement Agreement may be executed by exchange of faxed executed signature pages, and any signature transmitted by facsimile for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement. This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

12.13 Binding Effect. This Settlement Agreement binds and inures to the benefit of the parties hereto, their assigns, heirs, administrators, executors and successors.

12.14 Effective Date. The date on which the final signature is affixed below shall be the Agreement Execution Date. This Settlement Agreement shall not be effective until the Agreement Execution Date.

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement on the dates set forth below.

NAMED PLAINTIFFS:

PAMELA M. TITTLE on behalf of herself and all members of the Settlement Class:

Dated: April 15, 2004

By: _____

Lynn Lincoln Sarko, Esq.
KELLER, ROHRBACK, LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Phone (206) 623-1900
Fax: (206) 623-3384

Dated: _____

By: _____

Steve W. Berman, Esq.
HAGENS BERMAN, LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Tel.:(206) 623-7292
Fax:(206) 623-0594

12.12 Counterparts. This Settlement Agreement may be executed by exchange of faxed executed signature pages, and any signature transmitted by facsimile for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement. This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

12.13 Binding Effect. This Settlement Agreement binds and inures to the benefit of the parties hereto, their assigns, heirs, administrators, executors and successors.

12.14 Effective Date. The date on which the final signature is affixed below shall be the Agreement Execution Date. This Settlement Agreement shall not be effective until the Agreement Execution Date.

IN WITNESS WHEREOF, the Settling Parties have executed this Settlement Agreement on the dates set forth below.

NAMED PLAINTIFFS:

PAMELA M. TITTLE on behalf of herself and all members of the Settlement Class:

Dated: _____

By: _____
Lynn Lincoln Sarko, Esq.
KELLER, ROHRBACK, LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Phone (206) 623-1900
Fax: (206) 623-3384

Dated: 4/15/04

By: _____
Steve W. Berman, Esq.
HAGENS BERMAN, LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
Tel.:(206) 623-7292
Fax:(206) 623-0594

THE SETTLING DEFENDANTS:

Dated: 4/15/04

By: _____
Paul J. Ondrasik, Jr., Esq.
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.429.8088
Fax: 202.429.3902
Counsel to the Appendix "A" Defendants

Dated: _____

By: _____
Jacks C. Nickens, Esq.
NICKENS, KEETON, LAWLESS, FARRELL & FLACK, LLP
600 Travis, Suite 7500
Houston, Texas 77002
Phone: (713) 571-9191
Fax: (713) 571-9652
Counsel to the Appendix "B" Defendants

Dated: _____

By: _____
Robin Gibbs, Esq.
GIBBS & BRUNS
1100 Louisiana, Suite 5300
Houston, TX 77002
Tel.: (713) 650-8805
Fax: (713) 750-0903
Counsel to the Appendix "C" Defendants

Dated: _____

By: _____
W. Neil Eggleston, Esq.
HOWREY SIMON ARNOLD & WHITE LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
Phone: 202.783.0800
Fax: 202.383.6610
Counsel to the Appendix "C" Defendants and Paulo Ferraz Pereira

THE SETTLING DEFENDANTS:

Dated: _____

By: _____
Paul J. Ondrasik, Jr., Esq.
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.429.8088
Fax: 202.429.3902
Counsel to the Appendix "A" Defendants

Dated: 4.15.04

By: _____
Jacks C. Nickens, Esq.
NICKENS, KEETON, LAWLESS, FARRELL & FLACK, LLP
600 Travis, Suite 7500
Houston, Texas 77002
Phone: (713) 571-9191
Fax: (713) 571-9652
Counsel to the Appendix "B" Defendants

Dated: _____

By: _____
Robin Gibbs, Esq.
GIBBS & BRUNS
1100 Louisiana, Suite 5300
Houston, TX 77002
Tel.: (713) 650-8805
Fax: (713) 750-0903
Counsel to the Appendix "C" Defendants

Dated: _____

By: _____
W. Neil Eggleston, Esq.
HOWREY SIMON ARNOLD & WHITE LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
Phone: 202.783.0800
Fax: 202.383.6610
Counsel to the Appendix "C" Defendants and Paulo Ferraz Pereira

THE SETTLING DEFENDANTS:

Dated: _____

By: _____
Paul J. Ondrasik, Jr., Esq.
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.429.8088
Fax: 202.429.3902
Counsel to the Appendix "A" Defendants

Dated: _____

By: _____
Jacks C. Nickens, Esq.
NICKENS, KEETON, LAWLESS, FARRELL & FLACK, LLP
600 Travis, Suite 7500
Houston, Texas 77002
Phone: (713) 571-9191
Fax: (713) 571-9652
Counsel to the Appendix "B" Defendants

Dated: 4/15/04

By: _____
Robin Gibbs, Esq.
GIBBS & BRUNS
1100 Louisiana, Suite 5300
Houston, TX 77002
Tel.: (713) 650-8805
Fax: (713) 750-0903
Counsel to the Appendix "C" Defendants

Dated: _____

By: _____
W. Neil Eggleston, Esq.
HOWREY SIMON ARNOLD & WHITE LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
Phone: 202.783.0800
Fax: 202.383.6610
Counsel to the Appendix "C" Defendants and Paulo Ferraz Pereira

THE SETTLING DEFENDANTS:

Dated: _____ By: _____
Paul J. Ondrasik, Jr., Esq.
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
Phone: 202.429.8088
Fax: 202.429.3902
Counsel to the Appendix "A" Defendants

Dated: _____ By: _____
Jacks C. Nickens, Esq.
NICKENS, KEETON, LAWLESS, FARRELL & FLACK, LLP
600 Travis, Suite 7500
Houston, Texas 77002
Phone: (713) 571-9191
Fax: (713) 571-9652
Counsel to the Appendix "B" Defendants

Dated: _____ By: _____
Robin Gibbs, Esq.
GIBBS & BRUNS
1100 Louisiana, Suite 5300
Houston, TX 77002
Tel.: (713) 650-8805
Fax: (713) 750-0903
Counsel to the Appendix "C" Defendants

Dated: 4.15.04 By: _____
W. Neil Eggleston, Esq.
HOWREY SIMON ARNOLD & WHITE LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004
Phone: 202.783.0800
Fax: 202.383.6610
Counsel to the Appendix "C" Defendants and Paulo Ferraz Pereira

SCHEDULES AND EXHIBITS TO THE SETTLEMENT AGREEMENT

Schedule	Title
1.3	Administrative Committee Settling Defendants
1.29	Officer and Director Settling Defendants

Appendices

Appendix "A"	Appendix "A" Defendants
Appendix "B"	Appendix "B" Defendants
Appendix "C"	Appendix "C" Defendants

Schedule 1.3
The "Administrative Committee Settling Defendants"

Barnhart, James G.
Bazelides, Philip J.
Crane, Keith
Enron Corp. Employee Stock Ownership Plan Administrative Committee
Enron Corp. Savings Plan Administrative Committee
Gathmann, William D.
Gulyassy, William J.
Hayslett, Rod
John Does Nos. 1-100 Unknown Fiduciaries of the Enron Corp. Savings Plan or the Enron Corp. ESOP or the Enron Corp. Cash Balance Plan who were Administrative Committee members
Joyce, Mary K.
Knudsen, Sheila
Lindholm, Tod A.
Olson, Cindy K.
Prentice, James S.
Rath, Mikie
Rieker, Paula
Shields, David

Schedule 1.29
The "Officer and Director Settling Defendants"

Robert A. Belfer
Norman P. Blake, Jr.
Ronnie C. Chan
James V. Derrick
John H. Duncan
Joe H. Foy
Wendy L. Gramm
Kevin P. Hannon
Kenneth Harrison

Robert K. Jaedicke
Rebecca P. Mark-Jusbasche
Charles A. LeMaistre
John Mendelsohn
Jerome J. Meyer
Lou L. Pai
Paulo Ferraz Pereira
Frank Savage
Joseph W. Sutton
Jack Urquhart
John Wakeham
Charls E. Walker
Lawrence Greg Whalley
Bruce Willison
Herbert Winokur, Jr.
Estate of J. Clifford Baxter
Richard B. Buy
Richard A. Causey
Mark A. Frevert
Joseph M. Hirko
Stanley C. Horton
Steven J. Kean
Mark E. Koenig
Michael S. McConnell
Jeffrey McMahon
J. Mark Metts
Kenneth D. Rice

APPENDIX "A" DEFENDANTS

Barnhart, Estate of James G.
Bazelides, Philip J.
Crane, Keith
Gulyassy, William J.
Hayslett, Rod
Joyce, Mary K.
Knudsen, Sheila
Lindholm, Tod A.
Prentice, James S.
Rath, Mikie
Shields, Estate of David

APPENDIX "B" DEFENDANTS

Estate of J. Clifford Baxter
Richard B. Buy
Richard A. Causey
Mark A. Frevert
Kevin P. Hannon
Joseph M. Hirko
Steven J. Kean
Mark E. Koenig
Michael S. McConnell
Jeffrey McMahon
J. Mark Metts
Cindy K. Olson
Kenneth D. Rice
Paula Rieker

Lawrence Greg Whalley

APPENDIX "C" DEFENDANTS

Robert A. Belfer
Norman P. Blake, Jr.
Ronnie C. Chan
John H. Duncan
Joe H. Foy
Wendy L. Gramm
Robert K. Jaedicke
Charles A. LeMaistre
John Mendelsohn
Jerome J. Meyer
Frank Savage
John Wakeham
Charls E. Walker
Herbert Winokur, Jr.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, v. ENRON CORP., et al., Defendants.	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

ORDER PRELIMINARILY APPROVING PARTIAL SETTLEMENT CONDITIONALLY CERTIFYING CLASS FOR PURPOSES OF SETTLEMENT, APPROVING FORM AND MANNER OF NOTICE, AND SCHEDULING HEARING ON FAIRNESS OF SETTLEMENT PURSUANT TO FEDERAL RULE CIVIL PROCEDURE 23(E)

WHEREAS, consolidated class actions are pending before this Court, including *Tittle, et. al. vs. Enron Corp., et. al.*, No. H-01-3913 (Southern District of Texas); and

WHEREAS, the *Tittle* Named Plaintiffs and the Settling Defendants have applied to the Court, pursuant to Fed. R. Civ. P. 23, for an Order approving the Partial Settlement of the above-named action as to them in accordance with the Class Action Settlement Agreement among

them, dated April 15, 2004 (the "Agreement"), which, together with the schedules and exhibits thereto, sets forth the terms and conditions for a proposed settlement of the action as to the Settling Defendants and for dismissal of the action with prejudice as to the Settling Defendants;

WHEREAS, the Agreement provides for the conditional certification of the *Tittle* Settlement Class, solely for the purposes of settlement; and

WHEREAS, the Court has read and considered the Agreement and the schedules and exhibits thereto and has read and considered all other papers filed and proceedings had herein, and is otherwise fully informed in the premises, and with good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. This Order (the "Preliminary Approval Order") incorporates by reference the definitions in the Agreement, and all capitalized terms used herein shall have the same meanings set forth in the Agreement.

2. The Court has jurisdiction over the subject matter of this Action and over all parties to this Action, including all members of the Plaintiff Class and Defendants.

3. The Court preliminarily approves the Agreement, including the releases contained therein, and the settlement as being fair, reasonable, and adequate to the Settlement Class.

4. Solely for the purposes of the Agreement, the Court now finds and concludes that:

a) With respect to the Plaintiffs' released claims, particularly in light of the Agreement: (1) the members of the Settlement Class are so numerous that joinder of all Class Members in this action is impractical; (2) there are questions of law and fact common to the Settlement Class; (3) the claims of the Named Plaintiffs are typical of the claims of the Settlement Class; and (4) in negotiating and entering into the Agreement, the Named Plaintiffs and their counsel have fairly and adequately represented and protected the interests of all Settlement Class Members;

b) With respect to the *Tittle* Settlement Class Members' claims: (1) the prosecution of separate actions by individual *Tittle* Settlement Class Members would create a

risk of inconsistent or varying adjudications with respect to such individual *Tittle* Settlement Class Members that would establish incompatible standards of conduct for the Settling Defendants; and (2) adjudications with respect to individual *Tittle* Settlement Class Members would, as a practical matter, dispose of the interests of other individual *Tittle* Settlement Class Members, not parties to the *Tittle* action or substantially impair or impede the ability of other such individual *Tittle* Settlement Class Members to protect their interests.

5. With respect to this *Tittle* Settlement Class Members' claims, the Settlement Class is hereby conditionally certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(1) in accordance with the following definition:

> "Settlement Class" means, collectively, all persons who were participants or beneficiaries in the Enron Corp. Savings Plan (401K), the Enron Corp. Employee Stock Ownership Plan (ESOP) and/or the Enron Corp. Cash Balance Plan during the period January 1, 1995 through December 2, 2001.

6. Solely for the purposes of the Agreement, the Named Plaintiffs in the *Tittle* action are certified as class representatives pursuant to Fed. R. Civ. P. 23(b)(1).

7. The Court approves, as to form and content, the Notice of Class Action Settlement annexed to the Memorandum in Support of *Tittle* Plaintiffs' Motion for Preliminary Approval of Proposed Partial Settlement as Exhibit C (the "Mailed Notice").

8. The Court approves, as to form and content, the Publication Notice annexed to the Memorandum in Support of *Tittle* Plaintiffs' Motion for Preliminary Approval of Proposed Partial Settlement as Exhibit D (the "Publication Notice").

9. The date and time of the Fairness Hearing shall be added to the Mailed Notice and the Publication Notice before they are mailed and published, respectively, in accordance with paragraph 11(a) and (b) below.

10. The Court finds that the mailing, publication, and distribution of the Mailed Notice and Publication Notice substantially, in the manner and form set forth in paragraphs

11(a), (b), and (c) below, constitutes the best notice practicable under the circumstances, including individual notice to all Settlement Class Members who can be identified through reasonable effort, and constitutes valid, due, and sufficient notice to all persons entitled thereto, complying fully with the requirements of Fed. R. Civ. P. 23 and due process.

11. The Notice Administrator is empowered to supervise and administer the notice procedure, as set forth below:

(a) Commencing on or before _____, 2004, the Notice Administrator shall mail or cause to be mailed, by first class mail, postage pre-paid, copies of the Mailed Notice to all Settlement Class Members who can be identified by class counsel, with reasonable effort, at each such Settlement Class Member's known address; and

(b) On or before _____, 2004, the Notice Administrator shall cause the Publication Notice to be published in the *Houston Chronicle*, in *The Wall Street Journal*, in *The Oregonian*, in *The Omaha World-Herald*, and on class counsels' websites.

(c) At or prior to the fairness hearing (as defined below), class counsel shall file with the Court and serve on counsel for the Settling Defendants proof by declaration or affidavit of the mailing and publication described in paragraphs 11(a) and 11(b) above.

12. Settlement Class Members who wish to comment or object to the Agreement must do so in accordance with the instructions contained in the Mailed Notice.

13. All persons who fall within the definition of the Settlement Class and who do not timely object, and/or comment, in accordance with the instructions in the Mailed Notice, shall be subject to and bound by the provisions of the Agreement, the Releases contained therein, and the Judgment with respect to all released claims.

14. A hearing (the "Fairness Hearing") shall be held at 9:00 A.M. Thursday, August 19, 2004, before The Honorable Melinda Harmon, United States District Judge, at the United States District Court for the Southern District of Texas, Bob Casey, United States Courthouse, 515 Rusk Avenue, Houston, Texas 77002, to determine:

(a) whether the proposed Settlement is fair, reasonable, and adequate and should be approved by the Court;

(b) finally whether this Action satisfies the applicable pre-requisites for class action treatment under Fed. R. Civ. P. 23(a) and 23(b)(1) for purposes of the Settlement;

(c) whether the Settlement has been negotiated at arm's length by the Plaintiffs and their counsel on behalf of the Plan and the Plaintiff Class, whether the Plaintiffs have acted independently and that their interests are identical to the interests of the Plan and the Plaintiff Class, and for the Court to determine that the negotiations and consummation of the Settlement by the Plaintiffs on behalf of the Plan and the Plaintiff Class do not constitute "prohibited transactions" as defined by ERISA §§ 406(a) or (b);

(d) whether the Order Approving Settlement as provided under the Agreement should be entered and whether the Released Parties should be released of and from the Plaintiffs' Released Claims, as provided in the Agreement;

(e) whether the Underwriters Released Claims should not release any claims against the Underwriters or any other insurance carriers pertaining to coverage under the fidelity bonds that provide coverage to the Plans, including St. Paul Crime Loss Indemnity Policy, Policy No. 400 JW 6221; Federal Insurance Policy, Policy No. 8109-28-95G; Great American Insurance Company, Policy No. CRP 268-75-60, and any other fidelity bonds that may provide coverage to the Plans;

(f) whether the Settlement Agreement does not release, bar or waive any Claim that can or has been asserted under the state or federal securities laws by the Enron Plans, the Enron Plans' Trustees, or any individual member of the Settlement Class directly or derivatively in the *Newby Action*;

(g) whether the bar order provisions in the Agreement should be entered;

(h) whether the proposed Plan of Allocation of the Settlement is fair, reasonable, and adequate and should be approved by this Court;

(i) whether Plaintiffs' Counsels' application for an award of attorneys' fees and expenses pursuant to the common fund doctrine is fair, reasonable, and adequate and should be approved by the Court; and

(j) to rule upon such other matters as the Agreement contemplates and as the Court may deem just and proper.

15. Any application by Counsel for Plaintiffs with respect to attorneys' fees and expenses, and all papers in support thereof, shall be filed with the Court and served on all counsel of record no later than _____, 2004. Copies of such materials shall be available for inspection at the office of the Clerk and on Class Counsels' websites.

16. All papers detailing the plan of allocation for the proceeds of the Settlement Agreement, shall be filed with the Court and served on all counsel of record no later than _____, 2004. Copies of such plan of allocation shall be available for inspection at the office of the Clerk and on Class Counsels' websites.

17. All papers in response to any objections and briefs in support of Final Approval shall be filed by August 9, 2004.

18. Any Settlement Class Member may appear and show cause (if he, she, or it has any) why the Court should or should not: (1) approve the proposed settlement as set forth in the Agreement as fair, reasonable, and adequate; (2) enter the Order of Final Judgment and Dismissal substantially in the form annexed as Exhibit E to the Memorandum in Support of *Tittle* Plaintiffs' Motion for Preliminary Approval of Proposed Partial Settlement; (3) approve the plan of allocation; or (4) approve Class Counsels' Petition to Establish Reserves for Attorneys' Fees and Expenses, not to exceed the amount set forth in the Mailed Notice and Publication Notice; provided, however, that no person shall be heard with respect to, or shall be entitled to contest, the foregoing matters, unless on or before July 9, 2004, that person has served by hand, or by first class mail notice of his, her, or its intention to appear, setting forth briefly each objection

and the basis therefore, together with copies of any briefs and papers in support of said objections and proof of membership in the Settlement Class, upon:

Steve Berman and Clyde Platt
Hagens Berman, LLP
1301 5th Avenue, Suite 2900
Seattle, WA 98101;

and

Lynn Lincoln Sarko and Britt L. Tinglum
Keller Rohrback, LLP
1201 Third Avenue, Suite 3200
Seattle, WA 98101

(on behalf of the Plaintiffs in the *Tittle* action);

and upon:

Kathy Patrick
Michael K. Oldham
Gibbs & Bruns, LLP
1100 Louisiana, Suite 5300
Houston, TX 77002

(on behalf of the Settling Defendants);

and has filed said objections, papers, and briefs with the Court, upon:

Clerk of the Court
United State District Court
Southern District of Texas – Houston Division
515 Rusk Avenue
Houston, TX 77002.

Unless otherwise ordered by the Court, any Settlement Class Member who does not make his, her, or its objection in the manner provided for herein, shall be deemed to have waived such objection and shall forever be disclosed from making any objection to the foregoing matters.

19. The Court may adjourn the fairness hearing from time to time and without further notice to the Settlement Class. The Court reserves the right to approve the settlement at or after the fairness hearing with such modifications as may be consented to by the Settling Parties and

without further notice to the Settlement Class. The Court further reserves the right to enter the Order of Final Judgment and Dismissal, dismissing the action with prejudice as to the Settling Defendants and against the named Plaintiffs and the Settlement Class at or after the settlement hearing and without further notice to the Settlement Class.

20. Upon entry of the Order of Final Judgment and Dismissal, the named Plaintiffs and each of the Settlement Class Members, on behalf of themselves, their successors, assigns, and any other person claiming (now and in the future) through or on behalf of them, and regardless of whether any such named Plaintiff or Settlement Class Member ever seeks or obtains by any means any distribution from the Settlement Trust, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Plaintiffs' Released Claims against all Settling Defendants and shall have coveted not to sue all such Plaintiffs' released claims with respect to all such Settling Defendants, and shall be permanently barred and enjoined from instituting, commencing, or prosecuting any such Plaintiffs' Released Claims against any Settling Defendant.

21. The Fiduciary of the Savings Plan and ESOP shall, within ten (10) calendar days of receiving the Mailed Notice, send a list of the names and addresses of such participants in the Savings Plan, ESOP and Cash Balance Plan to the Notice Administrator, in which event the Notice Administrator shall promptly mail the Mailed Notice to such participants in the Savings Plan, ESOP and Cash Balance Plan.

22. All reasonable costs and expenses incurred in identifying and providing notice to Settlement Class Members and in administering the Settlement Fund shall be paid as set forth in the Agreement.

23. The Court retains jurisdiction over all proceedings arising out of or related to the Settlement Agreement.

24. If for any reason the Settlement Agreement does not become effective in accordance with the terms of the Settlement Agreement, this Preliminary Approval Order shall be rendered null and void and shall be vacated *nunc pro tunc*.

25. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of this Preliminary Approval Order or the Agreement.

26. Pending final determination as to whether the settlement, as set forth in the Settlement Agreement, should be approved, no Settlement Class Member shall commence, prosecute, pursue, or litigate any Plaintiffs' Released Claims against any Settling Defendant, whether directly, representatively, or in any other capacity, and as regards to whether or not any such Settlement Class Member has appeared in the action.

IT IS SO ORDERED.

Signed this ___ day of May 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

NOTICE OF PARTIAL CLASS ACTION SETTLEMENT

In re Enron Corporation ERISA Litigation)
No. H-01-3913 (Consolidated Cases))
)

TO ALL MEMBERS OF THE FOLLOWING CLASS

All persons who were participants or beneficiaries in the Enron Corp. Savings Plan (401K), the Enron Corp. Employee Stock Ownership Plan (ESOP) and/or the Enron Corp. Cash Balance Plan (the "Plans") during the period January 1, 1995 through December 2, 2001.

PLEASE READ THIS NOTICE CAREFULLY.
A FEDERAL COURT AUTHORIZED THIS NOTICE.
THIS IS NOT A SOLICITATION.

This Notice advises you of a proposed Partial class action settlement. The Settlement will provide $85 million (less attorneys' fees and costs) to pay claims to all persons who were participants or beneficiaries in the Plans during the period from January 1, 1995 through December 2, 2001 ("Class Period"). The Partial Settlement resolves claims concerning certain fiduciaries of the Plans who breached their fiduciary duties by violating the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. You should read the entire Notice carefully because your legal rights are affected whether you act or not.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
YOU CAN DO NOTHING NO ACTION IS NECESSARY TO RECEIVE A PAYMENT	You do not need to do anything to receive a payment. Under the Settlement, the Plan Administrator will calculate the portion, if any, of the Settlement you are entitled to receive. If you are a current Plan participant and are authorized to receive a payment, the Plan Administrator will deposit the payment into your Plan(s) account(s) in the manner you designate for Plan contributions. If you are a Class Member, and no longer participate in the Plan(s), your Settlement proceeds will be deposited into a money market account pending instructions from you. If no instructions are received, the amount will be sent to you in a check. Amounts distributed should be treated as qualified Plan distributions and can be "rolled over" tax-free.
YOU CAN OBJECT	You can write to the Court about why you don't like the Settlement.
YOU CAN GO TO A HEARING	You can ask to speak in Court about the fairness of the Settlement.

Your rights and options, and the date by which you must object if you are opposed to the Settlement are explained in this notice.

QUESTIONS? CALL 1-866-560-4043 TOLL FREE, OR VISIT www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.
Do not call the Court, or Enron.
They cannot answer your questions.

WHAT THIS NOTICE CONTAINS

Basic Information

1. Why did I get this notice package?

You or someone in your family is a participant or beneficiary in the Enron Corp. Savings Plan (401K), the Enron Corp. Employee Stock Ownership Plan (ESOP) and/or the Enron Cash Balance Plan (the "Plans") during the period January 1, 1995 through December 2, 2001 ("Class Period").

The Court sent you this Notice because you have a right to know about a proposed Partial Settlement of a class action lawsuit and about all of your options, before the Court decides whether to approve the Settlement. If the Court approves the Settlement and after objections and appeals, if any, are resolved, the Plan and Settlement Administrators appointed by the Court will make the payments that the Settlement allows.

This package explains the lawsuit, the Settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of the case is the United States Southern District Court of Texas, and the case is known as *In re Enron Corp. ERISA Litigation*, Case No. H-01-3913. The people who sued are called Plaintiffs, and the company and the people they sued, Enron Corp. and several of its officers and directors, among others are called the Defendants.

2. How do I get more information?

You can call 1-866-560-4043 toll-free, or visit any of the following websites: **www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com,** where you will find answers to common questions about the Partial Settlement, plus other information to help you determine whether you are a Class Member and whether you are eligible for a payment. **Please do not contact the Court, or Enron. They will not be able to answer your questions.**

3. What is this lawsuit about?

In the Second Amended Consolidated Class Action Complaint filed January 2nd, 2004, Plaintiffs allege that the Defendants breached their fiduciary duties and otherwise violated ERISA, by using employer and employee contributions to the Plan to purchase Stock at a time when, according to Plaintiffs, the Stock was an unsuitable and imprudent investment for the Plan. Plaintiffs further allege that Defendants violated ERISA by misrepresenting to Plaintiffs and Plan participants the financial status of Enron and, consequently, the true value of the Stock. The Complaint seeks to recover from the Defendants losses to the Plan, and indirectly, to its participants and beneficiaries caused by Defendants' alleged conduct. This recovery for losses will be in addition to attorney fees and expenses.

4. Why is this a class action?

In a class action, one or more persons called Class Representatives sue on behalf of people who have similar claims. All of these people who have similar claims make up the Class and are Class members. One court resolves the issues for all Class members. Because the wrongful conduct alleged by Plaintiffs in this case affected a large group of people in a similar way, Plaintiffs filed this case as a class action.

5. Why is there a Partial Settlement?

The Court has not decided in favor of Plaintiffs or Defendants. Instead, the Settling Defendants agreed to a Partial Settlement. By agreeing to this Partial Settlement, the settling parties avoid the costs and risk of a trial, and the Class will get compensation. The Class Representatives and their attorneys believe that the Partial Settlement is best for all Class members.

6. How do I know if I am part of the Settlement?

The Court has conditionally certified this case as a class action, in which everyone who fits the following description is a Class Member:

All persons who were participants or beneficiaries in the Plans during the Class Period. This includes both present and former employees of Enron Corp. (or its subsidiaries).

7. Are there exceptions to being included?

You are not a Class Member if you were named as a Defendant.

8. I'm still not sure if I'm included.

If you are still not sure whether you are included, you can ask for free help. Please call 1-866-560-4043 or visit **www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.**

9. Can I exclude myself from the Settlement?

In some class actions, Class Members have the opportunity to exclude themselves from a Settlement. This is sometimes referred to as "opting out" of the Settlement. **You do not have the right to exclude yourself from the Settlement in this case**. The case was certified under Fed. R. Civ. P. 23(b)(1) as a "non opt-out" class action because of the way ERISA operates. Breach of fiduciary duty claims must be brought by participants on behalf of the Plan, and any judgment or resolution necessarily applies to all Plan participants and beneficiaries. As such, it is not possible for any participants or beneficiaries to exclude themselves from the benefits of the Settlement. **Therefore, you will be bound by any judgments or orders that are entered in this Action, and, if the Partial Settlement is approved, you will be deemed to have released each and all of the Defendants from any and all claims that were or could have been asserted in this case on your behalf or on behalf of the Plan or otherwise included in the release in the Partial Settlement, other than your right to obtain the relief provided to you, if any, by the Partial Settlement.**

Although you cannot opt-out of Partial Settlement, you can object to the Partial Settlement and ask the Court not to approve the Settlement. See question 17 on page 6.

THE SETTLEMENT BENEFITS

10. What does the Settlement provide?

The Settling Defendants have agreed to pay $85 million to resolve Plaintiffs' claims against them. The payment is called the Settlement Fund. Certain fees and expenses, including those incurred by Plaintiffs' Counsel that are approved by the Court, will be deducted from the Settlement Fund. The Settlement does not release any claim you may have under the state or federal securities laws.

11. How much will my payment be?

Your share of the Net Settlement Fund will depend on the number of shares of Stock you held in your Plan account(s) during the Class Period, and the amount that you lost as a result of this holding. The formula will take into account your purchases or sales of Stock in your Plan(s) account(s). The more you lost because of Stock in your Plan account(s), the larger your share of the Net Settlement Fund will be. Your share of the Net Settlement Fund, however, will be *less* than your actual losses. **You are not responsible for calculating the amount you may be entitled to receive under the Settlement – this will be done by the Settlement Administrator.**

A plan of allocation calculating the amount each Class Member will receive will be filed with the Court no later than _____, 2004. You can access the plan of allocation on that date using the websites indicated below or by calling the toll free number or by reviewing the plan of allocation at the office of the Clerk of Court.

Do not worry if you do not have records that show your Plan activity with respect to Stock. The Settlement Administrator will make all calculations for you, and if you are entitled to a payment, will provide you with a statement showing the amount of your payment. **If you have questions regarding the settlement or the settlement amount you may receive please do not contact the court or Enron. Instead, please call 1-866-560-4043 or visit www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.**

12. What is the Bar Order?

Under the terms of this Partial Settlement, which does not include all the Defendants in the lawsuit, the Settling Defendants will be protected from claims of contribution and indemnity from those Defendants not a part of the Settlement Agreement. In the future, if a judgment is obtained against any of these non-settling Defendants who are insured under the Enron Fiduciary Liability Policies, each of the non-settling Defendants will receive a credit against the judgment in the amount of the Settlement Amount and an additional Ten Million dollars.

HOW YOU GET A PAYMENT

13. How can I get my payment?

If you are a Class member and still participate in the Plans, your Settlement proceeds will be deposited in your Plan(s) account(s) directly in the same manner as you direct the investment of contributions to your Plan(s) account(s). You may then direct it to any desired fund option. If you are a Class member and no longer participate in the Plan, your Settlement proceeds will be deposited into a money market account pending instructions from you. If no instructions are received, the amount will be sent to you in a check. Amounts distributed are treated as qualified Plan distributions and can be "rolled over" tax-free. You will not be receiving funds directly as the net settlement funds will be sent to the Plans for your benefit.

14. When will I get my payment?

The Court will hold a hearing at 9 A.M. Thursday, August 19, 2004, to decide whether to approve the Settlement. If Judge Harmon approves the Settlement, appeals may follow. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps more than a year. Please be patient.

THE LAWYERS REPRESENTING YOU

15. Do I have a lawyer in this case?

The Court appointed the law firms of Keller Rohrback L.L.P. in Seattle, Washington; and Hagens-Berman, L.L.P. in Seattle, WA, to serve as the lead attorneys to represent you and other Class Members. The Court also appointed the law firm of Campbell, Harrison & Dagley LLP, to serve as liaison counsel. These lawyers with the other counsel appointed by the Court are called Class Counsel. You will not be personally charged for these lawyers. These lawyers will be paid from the Settlement. If you want to be represented by your own lawyer, you may hire one at your own expense.

16. How will the lawyers be paid?

Class Counsel will ask the Court for attorney fees not to exceed 20% and for reimbursement of actual expenses not to exceed $5 million of the Settlement Fund. The Court may award less than these amounts.

OBJECTING TO THE SETTLEMENT

You can tell the Court that you do not agree with the Settlement or some part of it.

17. What does it mean to object?

Objecting is simply telling the Court that you do not like something about the Settlement. It will not have any bearing on your right to Settlement proceeds.

18. How do I tell the Court that I don't like the Settlement?

You can object to the Settlement if you dislike any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must send a letter saying that you object to the Settlement *In re Enron Corp. ERISA Litigation*. Be sure to include your name, address, telephone number, your signature, and the reasons you object to the Settlement. **Mail the objection to the four different places below postmarked no later than July 9, 2004. You must mail your objection by this date. If you fail to do so, the Court will not consider your objections.**

COURT	CLASS COUNSEL	DEFENSE COUNSEL
Clerk of the Court U.S. District Court Southern District of Texas, Houston Division 515 Rusk Avenue Houston, TX 77002	Lynn Lincoln Sarko Britt L. Tinglum Keller Rohrback, L.L.P. 1201 Third Avenue, Suite 3200 Seattle, WA 98101-3052 Steve W. Berman Clyde Platt Hagens Berman, L.L.P. 1301 Fifth Avenue Suite 2900 Seattle, WA 98101	Kathy Patrick Michael K. Oldham Gibbs & Bruns, L.L.P. 1100 Louisiana, Suite 5300 Houston, TX 77002

ALL PAPERS SUBMITTED MUST INCLUDE THE CASE NUMBER H-01-3913 ON THE FIRST PAGE.

QUESTIONS? CALL 1-866-560-4043 TOLL FREE, OR VISIT www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.
Do not call the Court, or Enron.
They cannot answer your questions.

THE COURT'S FAIRNESS HEARING

The Court will hold a hearing to decide whether to approve the Settlement. You may attend and you may ask to speak, but you are not required to do so.

19. When and where will the Court decide whether to approve the Settlement?

The Court will hold a Fairness Hearing at 9:00 A.M. Thursday, August 19, 2004 at the United States District Court for the Southern District of Texas, 515 Rusk Avenue, Houston, TX. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. Judge Harmon will listen to people who have asked to speak at the hearing. The Court will also decide what amount of Class Counsel fees and expenses will be paid from the Settlement Fund. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

20. Do I have to go to the fairness hearing?

No, Plaintiffs' Counsel will answer questions Judge Harmon may have. You are, however, welcome to go at your own expense. If you send an objection, you do not have to go to Court to talk about it. As long as your objection is postmarked by July 9, 2004 the Court will consider it. You also may pay your own lawyer to attend, but it is not necessary.

21. May I speak at the hearing?

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter saying that it is your "Notice of Intention to Appear *In re Enron Corp. ERISA Litigation.*" Be sure to include your name, address, telephone number, and your signature. Your Notice of Intention to Appear must be postmarked no later than July 9, 2004 and sent to the Clerk of the Court, Class Counsel, and Defense Counsel, at the four addresses indicated above in question 17.

IF YOU DO NOTHING

22. What happens if I do nothing at all?

The Settlement does not require you to do anything, and there is no penalty for doing nothing at all. If you are entitled to a Settlement payment, you will receive a payment as discussed on in question 11 on page 5.

GETTING MORE INFORMATION

23. Are there more details about the Settlement?

This notice summarized the proposed Settlement. More details are in the parties' Stipulation and Settlement Agreement. You can get a copy of the Agreement by visiting any of the following sites: **www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.**

Remember, please do not contact the Court, or Enron. They cannot help you with additional information.

DATE: _____, 2004.

QUESTIONS? CALL 1-866-560-4043 TOLL FREE, OR VISIT www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.
Do not call the Court, or Enron.
They cannot answer your questions.

EXHIBIT D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

NOTICE OF PARTIAL CLASS ACTION SETTLEMENT

In re Enron Corporation ERISA Litigation)
No. H-01-3913 (Consolidated Cases))
)

TO ALL MEMBERS OF THE FOLLOWING CLASS

All persons who were participants or beneficiaries in the Enron Corp. Savings Plan (401K), the Enron Corp. Employee Stock Ownership Plan (ESOP) and/or the Enron Corp. Cash Balance Plan (the "Plans") during the period from January 1, 1995 through December 2, 2001.

PLEASE READ THIS NOTICE CAREFULLY.
A FEDERAL COURT AUTHORIZED THIS NOTICE. THIS IS NOT A SOLICITATION.

A Partial Settlement has been proposed in a class action lawsuit brought by Plaintiffs on behalf of the Enron Corp. Savings Plan (401K), the Enron Corp. Employee Stock Ownership Plan (ESOP) and/or the Enron Cash Balance Plan (the "Plans") against Enron, and certain of its officers and directors for claiming breaches of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Partial Settlement will provide $85 million to the Settlement Class. Persons who were participants or beneficiaries of the Plans during the period January 1, 1995 through December 2, 2001 ("Class Period") may be entitled to a share of the Partial Settlement.

The United States District Court for the Southern District of Texas authorized this notice. The Court will have a hearing to decide whether to approve the Partial Settlement so that the benefits may be paid.

WHO IS INCLUDED?

You are a Class member and could get benefits if you had Stock allocated to your Plan(s) account(s) during the Class Period.

WHAT IS THIS ABOUT?

The lawsuit claims that the Defendants breached their fiduciary duties under ERISA by offering Enron stock as a Plan investment option, and investing and retaining Plan assets in Enron stock at a time when it was an unsuitable and imprudent investment for the Plan, providing misleading information regarding the financial condition of Enron and the prudence of its stock, and failing to take appropriate actions to protect participants and beneficiaries from losses to the Plan that were caused by these actions. Defendants deny that they breached any fiduciary duties or any other provisions of ERISA in connection with Enron stock in the Plan, or that they misrepresented the financial performance of Enron or the value of the Stock to Plan participants. The Court did not decide which side was right, but both sides agreed to the Partial Settlement to ensure a resolution, avoid the cost and risk of litigation, and to provide benefits to Class members.

WHAT DOES THE PARTIAL SETTLEMENT PROVIDE?

The Settling Defendants agreed to create a fund of $85 million to be divided among Settlement Class Members. The Settlement Agreement, available at the listed websites below, describes all of the details about the proposed Partial Settlement. Your share of the fund will depend on the decline in value of shares of Enron stock held in your Plan(s) account(s) during the Class Period. The Settlement Agreement does not release claims you may have under state or federal securities laws.

HOW DO YOU RECEIVE A PAYMENT?

If you are a Class member and are entitled to a share of the Partial Settlement amount according to the Agreement, you will not be required to do anything in order to receive a payment. Payments will be made directly to your Plan(s) account(s) or, if you no longer are a Plan participant, to a money market account pending instructions from you. Either way, the Plan(s) will notify you of the amount of your payment.

THE BAR ORDER

Under the terms of this Partial Settlement, which does not include all the Defendants in the lawsuit, the Settling Defendants will be protected from claims of contribution and indemnity from those Defendants not a part of the Settlement Agreement. In the future, if a judgment is obtained against any of these non-settling Defendants who are insured under the Enron Fiduciary Liability Policies, each of the non-settling Defendants will receive a credit against the judgment in the amount of the Settlement Amount and an additional Ten Million dollars.

CAN I OPT-OUT OF THE PARTIAL SETTLEMENT?

You do not have the right to exclude yourself from the Partial Settlement in this case. The case was certified under Fed. R. Civ. P. 23(b)(1) as a "non opt-out" class action because of the way ERISA operates. Therefore, you will be bound by any judgments or orders that are entered in this Action, and, if the Partial Settlement is approved, you will be deemed to have released all of the Settling Defendants from all claims that were or could have been asserted in this case or otherwise included in the release in the Partial Settlement, other than your right to obtain the relief provided to you, if any, by the Partial Settlement.

The Court will hold a hearing in this case (*In re Enron Corp ERISA Litigation* Case No. H-01-3913 at 9 A.M. Thursday, August 19, 2004, to consider whether to approve the Partial Settlement and a request by the lawyers representing all Class members (Keller Rohrback, L.L.P. of Seattle, Washington; and Hagens Berman, L.L.P. of Seattle, Washington) to set aside up to 20% of the Settlement Fund for attorney fees and up to an additional $5 million for expenses. Any fees and expenses that are later approved from those reserves will be paid from the Settlement Trust. You may ask to appear at the hearing, but it is not required. Although you cannot opt out of the Partial Settlement, you can object to the Partial Settlement and ask the Court not to approve the Settlement.

For more information regarding anything in this Notice, call toll free **1-866-560-4043** or visit **www.enronerisa.com, www.erisafraud.com, or www.hagens-berman.com.**

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, v. ENRON CORP., et al., Defendants.	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

ORDER OF FINAL JUDGMENT AND DISMISSAL

THIS MATTER, having come before the Court for hearing, pursuant to the Order of this Court, dated May 20, 2004, on the application of the Settling Parties for approval of the Settlement set forth in the Class Action Settlement Agreement dated April 15, 2004, (the "Agreement") and due and adequate notice having been given to the Settlement Class (as defined in the Agreement) as required in said Order, and the Court having considered all papers filed and proceedings had herein, and otherwise being fully informed in the premises and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. This Order incorporates by reference the definitions in the Agreement, and all capitalized terms used herein shall have the same meanings as set forth in the Agreement.

2. This Court has jurisdiction over the subject matter of the action and over all members of the Settlement Class.

3. The notice given to the Settlement Class of the Settlement and the other matters set forth in the Agreement was the best notice practicable under the circumstances, including individual notice to all members of the Settlement Class who could be identified through reasonable effort. Said notice provided due and adequate notice of these proceedings and of the matter set forth in the Agreement, including the Proposed Settlement, to all persons entitled to such notice, and said notice fully satisfied the requirements of Fed. R. Civ. P. 23, and due process.

4. Pursuant to Fed. R. Civ. P. 23, this Court hereby approves the Partial Settlement as set forth in the Agreement, finds that said settlement is, in all respects, fair, reasonable, and adequate with respect to the Settlement Class, and directs that the settlement be consummated in accordance with the terms and conditions set forth in the Agreement.

5. This Court hereby dismisses the action, in its entirety, as to the Settling Defendants, and against the named Plaintiffs, and the Settlement Class, with prejudice and without costs (except as otherwise provided in the Agreement).

6. Upon the date the conditions of Effectiveness of Settlement as set forth in Paragraph 2.1 of the Agreement occur, the named Plaintiffs and each of the Settlement Class Members, on behalf of themselves, their successors, and assigns, and any other person claiming (now or in the future), through or on behalf of them, and regardless of whether any such named Plaintiff or Settlement Class Member ever seeks or obtains by any means, any distribution from the Settlement Trust, shall be deemed to have, and by operation of this Order of Final Judgment and Dismissal shall have, fully, finally, and forever, released, relinquished, and discharged, all Plaintiffs' released claims against all Settling Defendants and shall have coveted not to sue all

such Settling Defendants with respect to all such Plaintiffs' released claims, and shall be permanently barred and enjoined from instituting, commencing, or prosecuting any such Plaintiffs' released claims against any Settling Defendants.

7. Upon the date the conditions of Effectiveness of Settlement as set forth in Paragraph 2.1 of the Agreement occur, all obligations of the Settling Defendants to the named Plaintiffs and the Settlement Class Members arising out of, based upon, or otherwise related to the transactions and occurrences that were alleged, or could have been alleged, on behalf of the named Plaintiffs and the Settlement Class Members in the Complaint in the action shall be fully, finally, and forever discharged, and all persons shall be permanently barred and enjoined from instituting, prosecuting, pursuing or litigating in any manner (regardless of whether such persons purport to act individually, representatively, or in any other capacity, and regardless of whether such persons purport to allege direct claims, claims for contribution, indemnification, or reimbursement, or any other claims) any such obligations.

8. Upon the date the conditions of Effectiveness of Settlement as set forth in Paragraph 2.1 of the Agreement occur, each of the Settling Defendants shall be deemed to have, and by operation of this Order of Final Judgment and Dismissal shall have, fully, finally, and forever released, relinquished, and discharged each and all of the Settlement Class Members and counsel to the named Plaintiffs from all claims (including unknown claims) arising out of, in any way relating to, or in connection with the institution, prosecution, assertion, settlement or resolution of the action, or the Plaintiffs' released claims except to enforce the releases and other terms and conditions contained in the Agreement.

9. This Order of Final Judgment and Dismissal does not release any claims against the Underwriters or any other insurance carriers pertaining to coverage under the fidelity bonds that provide coverage to the Plans, including St. Paul Crime Loss Indemnity Policy, Policy No. 400 JW 6221; Federal Insurance Policy, Policy No. 8109-28-95G; Great American Insurance

Company, Policy No. CRP 268-75-60, and any other fidelity bonds that may provide coverage to the Plans.

10. The Settlement Agreement and this Final Order of Judgment and Dismissal does not release, bar or waive any Claim that can or has been asserted under the state or federal securities laws by the Enron Plans, the Enron Plans Trustees, or any individual member of the Settlement Class directly or derivatively in the *Newby Action*.

11. This Order of Final Judgment and Dismissal is a final judgment in the action as to all claims among the Settling Defendants, on the one hand, and the named Plaintiffs and all Settlement Class Members, on the other. This Court finds, for purposes of Fed. R. Civ. P. 54(b), that there is no just reason for delay and expressly directs entry of Judgment as set forth herein.

12. Without affecting the finality of this Order of Final Judgment and Dismissal in any way, this Court retains continuing jurisdiction over: (a) implementation of the settlement; (b) any award or distribution of the Settlement Trust, including interest earned thereon; and (c) all other proceedings related to the implementation and enforcement of the terms of the Settlement Agreement.

13. In the event that the conditions of Effectiveness of Settlement as set forth in paragraph 2.1 of the Agreement do not occur, this Order of Final Judgment and Dismissal shall be rendered null and void and shall be vacated *nunc pro tunc*.

14. The Court approves a reserve for attorneys fees of up to 20% percent of the Settlement Fund for future awards of attorneys' fees to be approved by the Court and an additional reserve of expenses of $5 million dollars of the Settlement Fund for disbursement to Plaintiffs upon later order of the Court pursuant to the common fund doctrine. Except as otherwise provided herein each party shall bear its own fees, expenses, and costs.

15. Without affecting the finality of this Judgment, the Court retains jurisdiction for purposes of implementing the Agreement and reserves the power to enter additional orders to effectuate the fair and orderly administration and consummation of the Agreement and

Settlement, as may from time to time be appropriate, and resolution of any and all disputes arising thereunder.

16. Without further Order of the Court, the parties may agree to reasonable extensions of time to carry out any provisions of the Agreement.

IT IS SO ORDERED.

Dated this _____ day of _____, 2004.

_____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, v. ENRON CORP., et al., Defendants.	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

SCHEDULING ORDER

In connection with the proposed Partial Settlement of the claims in the above-captioned case, the following schedule will apply:

The Hearing on Preliminary Approval shall be on May 20, 2004 at 3:00 p.m.

Objections to the Settlement shall be filed not later than July 9, 2004.

Responses to Objections and briefs in support of Final Approval shall be filed not later than August 9, 2004.

Hearing on Final Approval shall be on August 19, 2004 at 9:00 a.m.

SIGNED this ____ day of May, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MAX MAY, an individual resident of Horn Lake, Desoto County, Mississippi, individually and in his capacity as a member of the Administrative Committee of the Memphis Equipment Company Employee Stock Ownership Plan, et al.,

Plaintiffs,

v.

No. 03-2112 Ml/A

NATIONAL BANK OF COMMERCE, a banking corporation organized under the laws of the United States of America, in its corporate capacity and as Trustee of the Memphis Equipment Company Employee Stock Ownership Plan, and LAWRENCE SCOTT, an individual resident of Cordova, Shelby County, Tennessee,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM OF LAWRENCE SCOTT

Before the Court is Plaintiffs' Motion to Dismiss Counterclaim of Lawrence Scott, filed July 17, 2003. Defendant Scott responded in opposition on August 19, 2003. For the following reasons, the Court GRANTS in part and DENIES in part Plaintiffs' motion.

This case concerns the Memphis Equipment Company, Inc.

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Employee Stock Ownership Plan (the "MEC ESOP"), which, prior to January 29, 1999, held all of the stock of Memphis Equipment Company, Inc. ("MEC"). Plaintiffs claim that Defendant Scott fraudulently obtained 100% of the stock in MEC from the MEC ESOP. Plaintiffs assert that Defendant Scott caused MEC to redeem all but one share of its stock, which he then purchased from the MEC ESOP for the sum of $7.78 without the knowledge of the MEC ESOP, the participants in the MEC ESOP, or the other members of the administrative committee for the MEC ESOP. Plaintiffs also allege that Defendant Scott used corporate funds for his own personal benefit. Plaintiffs also sue National Bank of Commerce ("NBC"), the trustee for the MEC ESOP, in connection with the transaction. Plaintiffs bring claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), and Tennessee state law.

After Plaintiffs filed their Amended Complaint, Defendant answered and filed a counterclaim under 29 U.S.C. § 1109 on behalf of himself, as a participant in the MEC ESOP, and all other participants. The counterclaim continues to deny that Defendant Scott committed any wrongdoing, but asserts that if he engaged in improper conduct then Mr. May and Mr. Thompson, as the other members of the administrative committee of the MEC ESOP, are also liable for negligence and breach of fiduciary duty to the MEC ESOP because they failed to discover his alleged

wrongdoing sooner. Plaintiffs now move to dismiss this counterclaim.

I. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a claim "for failure to state a claim upon which relief can be granted." When considering a 12(b)(6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint (or the counterclaim, in this case) as true, Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the light most favorable to the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a [claim] only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

II. ANALYSIS

Plaintiffs May and Thompson move to dismiss the counterclaim against them in their capacity as fiduciaries. They argue that ERISA does not permit a fiduciary to file a claim against another fiduciary for contribution. See, e.g., Kim v. Fujikawa, 871 F.2d 1427, 1432-33 (9th Cir. 1989).

In response, Defendant Scott maintains that while he does bring a counterclaim for contribution among fiduciaries under 29 U.S.C. § 1105, he also asserts a counterclaim against Plaintiffs

May and Thompson in his capacity as a participant in the MEC ESOP. Citing no case law, he alleges that, in the event he caused losses to the MEC ESOP through his purchase of the MEC stock, Plaintiffs May and Thompson breached their fiduciary duties to the MEC ESOP by failing to discover his wrongdoing sooner. Defendant Scott admitted in his Answer, and his counsel has admitted in open court, that Mr. Scott purchased the stock of MEC without the knowledge of Plaintiffs May and Thompson or the other plan participants.

With respect to Defendant Scott's counterclaim for contribution among fiduciaries, there are a number of conflicting authorities on this topic and there is a split among the circuit courts. Williams v. Provident Inv. Counsel, Inc., 279 F. Supp.2d 894, 898-99 (collecting differing cases). Of the circuit courts to have weighed in on this issue, the Ninth Circuit has concluded no right of contribution exists, while the Second and Seventh Circuits have concluded that a fiduciary may make a claim for contribution. Compare Kim, 871 F.2d at 1432-33, with Chemung Canal Trust Co. v. Sovran Bank/Maryland, 939 F.2d 12, 15-18 (2d Cir. 1991)[1], Free v. Briody, 732 F.2d 1331, 1136-38 (7th Cir.

[1] The Second Circuit's opinion also resulted in a dissent from Judge Altimari, who would have held that ERISA does not provide for a right of contribution among fiduciaries. Chemung, 939 F.2d at 18-19.

1984).[2] The Sixth Circuit has not yet issued an opinion on this question. McDannold v. Star Bank, N.A., 261 F.3d 478, 485-87 (6th Cir. 2001) (remanding to the district court the question of whether a fiduciary may claim a right to contribution).

Those cases holding that a right of contribution does not exist under ERISA rely on the absence of such a right in the statutory scheme. Congress enacted the statute for the benefit of ERISA plans, but there is no indication that it intended to protect the fiduciaries of those plans. Although Congress adopted many other principles of trust law when it drafted the statute, it did not provide for contribution among fiduciaries. Since ERISA provides a comprehensive set of laws, these courts presume the absence of such a provision was intentional. These

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[2] The Seventh Circuit held in Briody in 1984 that a fiduciary may make a claim for contribution. The court restated that view without elaboration in 1991. Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 464 (7th Cir. 1991). However, some lower courts within the Seventh Circuit have questioned the foundation for the Briody and Lumpkin decisions and declined to follow them in light of the Supreme Court's discussion of ERISA in Massachusetts Mut. Life Ins. Co. v. Russel, 473 U.S. 134, 146-47 (1985) ("The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'"). Mutual Life Ins. Co. of New York v. Yampol, 706 F.Supp. 596, 599 (N.D. Ill. 1989) (finding no right of contribution under ERISA); Plumbers Local 93 Health & Welfare Pension Fund v. DiPietro Plumbing Corp., 1999 U.S. Dist. Lexis 6913, *15-*16 (N.D. Ill. Apr. 30, 1999) (same).

courts have also declined to create such a right under the auspices of the federal common law. See, e.g., Kim, 871 F.2d at 1432-33; Williams, 279 F. Supp.2d at 898-903.

The courts reaching the opposite conclusion have developed a claim for contribution using the federal common law. These courts conclude that the ERISA statute adopted many aspects of trust law and because trust law provides for a right of contribution among fiduciaries, ERISA also should incorporate this remedy and the courts may appropriately fashion such a remedy. They also note the unfairness associated with denying a right of contribution and permitting plaintiffs to seek recovery from a party that is not entirely at fault or has deep pockets. See, e.g., Chemung, 939 F.2d at 15-18.

This Court will not reinvent the wheel and rewrite the many well-reasoned opinions that have already been published on this topic, all of which appear to rely on the same authorities in arriving at one decision or the other. This Court believes the better view is that adopted by the Ninth Circuit, Kim, 871 F.2d at 1432-33, and the other district courts within the Sixth Circuit, Williams, 279 F. Supp.2d at 898-903; Roberts v. Taussig, 39 F. Supp.2d 1010, 1011-12 (N.D. Ohio 1999); Daniels v. Nat'l Employee Benefit Servs., Inc., 877 F.Supp. 1067, 1073-74 (N.D. Ohio 1995). This view is more consistent with ERISA's statutory scheme, which is designed to protect beneficiaries and

participants of employee benefit plans, and is likely to provide more expeditious litigation for these parties. This Court concludes that ERISA does not provide for a right of contribution among fiduciaries and it is not appropriate to create such a right using federal common law.[3] The Court adopts the reasoning put forth in cases such as Kim and Williams. Accordingly, the Court GRANTS Plaintiffs' motion to strike Lawrence Scott's counterclaim and dismisses his claim for contribution.

The Court must also address Defendant Scott's counterclaim in his capacity as a plan participant under 29 U.S.C. § 1109. Although he maintains that he has done nothing wrong, his counterclaim argues that if his actions were improper, then Plaintiffs May and Thompson are liable to the MEC ESOP for breach of fiduciary duty because they did not discover his secret purchase of the MEC stock from the MEC ESOP sooner. Plaintiffs have not addressed this aspect of Defendant's counterclaim in their motion. Therefore, the issue is not properly before the Court and has not been sufficiently briefed by either party. The Court DENIES the motion to dismiss with respect to the counterclaim that Plaintiffs May and Thompson breached their fiduciary duties under 29 U.S.C. § 1109 to the participants of

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[3] The Court also notes that Defendant Scott has not argued in favor of the creation of right of contribution under the federal common law. His brief relies entirely on the text of 29 U.S.C. §§ 1105 & 1109.

the MEC ESOP. If Plaintiffs wish to provide further briefing on this issue, they may file another motion to dismiss within ten (10) days, otherwise, they should file an answer to the counterclaim.

So ORDERED this 26th day of February, 2004.

JON P. McCALLA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE

Notice of Distribution

This notice confirms a copy of the document docketed as number 176 in case 2:03-CV-02112 was distributed by fax, mail, or direct printing on February 27, 2004 to the parties listed.

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BOURLAND HEFLIN ALAREZ & MINOR
5400 Poplar Avenue
Ste. 100
Memphis, TN 38119

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Memphis, TN 38120

Tu M. Pham
U.S. MAGISTRATE JUDGE
167 N. Main
Rm. 934
Memphis, TN 38103

Honorable Jon McCalla
US DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAMELA M. TITTLE, et al., Plaintiffs, v. ENRON CORP., et al., Defendants.	CIVIL ACTION NO. H-01-3913 CONSOLIDATED CASES

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF PARTIAL SETTLEMENT, CONDITIONAL CERTIFICATION OF CLASS FOR PURPOSES OF SETTLEMENT, APPROVAL OF FORM AND MANNER OF NOTICE, AND SETTING OF HEARING ON FAIRNESS OF SETTLEMENT PURSUANT TO FED. R. CIV. P. 23(E)

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that at 3:00 p.m. on May 20, 2004, in the courtroom of The Honorable Melinda Harmon, at the United States Courthouse, Southern District of Texas – Houston Division, 515 Rusk Avenue, Fifth Floor, Houston, TX 77002, Plaintiffs' Counsel will

move for an Order, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(1), for preliminary approval of partial settlement, conditional certification of class for purposes of settlement, approval of the form and manner of notice of the partial settlement, and setting of hearing on the fairness of settlement, pursuant to Fed. R. Civ. P. 23(e).

The Settling Parties have reached a partial settlement of the above-captioned action and desire to have the Court preliminarily approve the partial settlement, approve the notice, certify the case as a class for settlement purposes. The Settling Parties are also moving the Court to grant final approval of the settlement and all of the terms therein following a fairness hearing, pursuant to Fed. R. Civ. P. 23(e).

THIS MOTION is based on this Notice of Motion and Motion, the Memorandum in Support of Tittle Plaintiffs' Motion for Preliminary Approval of Proposed Partial Settlement, including all exhibits, the pleadings and records on file in this case, and other such matters and argument as the Court may consider at the hearing of this Motion.

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2004, a true and correct copy of the foregoing document was served upon all known counsel of record via the http://www.esl3624.com web site, or as otherwise indicated pursuant to the Court's April 10, 2002, Order Regarding Service of Papers and Notice of Hearings.

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